IN THE

Supreme Court of the United States

October Term, 1943

No. 220

3205#20
GOR-HIL

WALTER FORD GORMLY,
Petitioner-Appellant,

vs.

UNITED STATES,
Respondent-Appellee.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI AND BRIEF

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. SUMMARY STATEMENT OF MATTER INVOLVED

This is an appeal from a conviction under the Selective Training and Service Act of 1940, as amended, and the rules and regulations thereunder, for failure to carry out a direction alleged to have been issued by Local Board No. 2 of Milwaukee, Wisconsin, for defendant to report to said Board on Aug. 24, 1942, for work of national importance, as a conscientious objector to both combatant and noncombatant service in the land or naval forces of the United States. Petitioner was indicted by grand jury (T. 2) Oct. 1, 1942. Trial was had Feb. 5, 1943, by jury (T. 21) and, upon verdict of guilty, defendant was sentenced the same day (T. 41) to imprisonment in an institution of the type to be designated by the Attorney General, or his authorized representative, for the period of five years (T. 41). The court recommended commitment to a U. S. penitentiary. (T. 42) In addition to constitutional questions and issues of general law, petitioner charges lack of due process and fair trial.

The defendant was classified by his local board in Class IV-E (T. 60). A member of the local board, without board meeting or vote, sent to petitioner a form of order to report to the local board, (T. 60, 61, 73) on Aug. 24, 1942, at 10:00 A.M. The purpose of reporting was to send petitioner from Milwaukee, Wisconsin to work at Camp Merom, Ind., (T. 13) to which the National Director of Selective Service had assigned him. (T. 73) The record does not show that petitioner ever accepted this assignment. On the day and hour in question petitioner reported to the United States Attorney. (T. 83) Petitioner refused to go to the camp because conscription therein made him a participant in the war machine and an accessory to murder on the battlefield. (T. 65) The camp in question is under the direction of the American Friends Service Committee, affiliated with the Friends, a religious organization of which defendant is not a member. (T. 76, 79, 80, 82) He is a Methodist (T. 65, 82). Petitioner, as an assignee at such camp, would be subjected to hard labor; at hours not consented to by him; without compensation; an object of charity as to board and spending money (T. 80); without free time except by consent of the Camp Director, by furlough or leave; and his earnings paid into the general funds of the United States. (S. S. Regulations, Part 691)

On June 9th the United States Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Eastern District of Wisconsin, and motion for rehearing made June 19, 1943, was denied on July 2, 1943. (T. 101)

II. REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of said Circuit Court of Appeals for the Seventh Circuit, as to appellant's contention that the term for which the Grand Jury was empaneled had expired before the return of the indictment, and said indictment was therefor invalid, is a decision of a federal question in conflict with applicable decisions of this Court. (T. 96, 94)

2. The decision of said Circuit Court of Appeals that the order directing the defendant to report, on which the indictment was based, signed simply by one member of the Board, there being positive evidence that the Board had not met or voted to authorize the issuance of the order,

involves an important question of federal law which has not been, but should by settled by this Court, and is an erroneous decision of an important question of general law in conflict with the weight of authority. (T. 968, 94)

3. The decision of said Circuit Court of Appeals that internment in a conscientious objectors' camp, at the conscientious objector's expense, or on charity, without compensation, does not constitute involuntary servitude, and that it may be imposed as a condition of exemption from military service, is a decision of federal question in conflict with applicable decisions of this Court. (T. 94, 96)

4. The decision of said Circuit Court of Appeals that the order in question is not an infringement of the provision of the United States Constitution that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, involves an important question of federal law which has not been, but should be settled by this court, and is a decision of a federal question in a way probably in conflict with applicable decisions of this court. (T. 94-96)

5. The decision of said Circuit Court of Appeals, contrary to appellant's contention that Congress could not delegate to the President, and the President could not re-delegate to the Director of Selective Service, the Local Boards, and the National Service Board for Religious Objectors, legislative and judicial powers, in derogation of petitioner's liberty is a decision of an important question of federal law which has not been, but should be settled by this court, and is a decision of a federal question in a way probably in conflict with applicable decisions of this court. (T. 94, 96)

6. The decision of the Circuit Court of Appeals that the defendant was bound to accept the assignment to work of national importance at a conscientious objectors camp is a decision of a federal question in conflict with applicable decisions of this Court, and with the general law. (T. 94, 96)

7. The decision of the Circuit Court of Appeals that the Selective Training and Service Act of 1940 and the regulations thereunder, denying defendant right of counsel, is due process is a decision of a federal question in conflict with the decisions of this Court. (T. 94, 96)

8. The decision of the Circuit Court of Appeals that an indictment for refusal to work need not allege that the work was under civilian direction, as required by

statute, is a decision of a federal question, probably in conflict with applicable decisions of this Court. (T. 94, 96)

9. The decision of the Circuit Court of Appeals that the defendant received due process and a fair trial, when in fact: the jury was not a fair sample of the community; the trial was held in part not in the presence of the defendant; the Court prejudged the issue which the jury was to try, and Court and counsel for the government made statements unnecessary to the prosecution or trial of the case, tending to arouse prejudice against the defendant; is in conflict with the general law and applicable decisions of this Court. (T. 94, 99, 100)

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 8244, Walter Ford Gormly, Appellant vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; that judgment herein of said United States Circuit Court of Appeals be reversed, and that petitioner have such further relief as may be proper.

Dated this 29th day of July, 1943.

PERRY J. STEARNS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINION OF COURT BELOW

1. The opinion (T. 93-100) in the Circuit Court of Appeals for the Seventh Circuit is reported in Vol. .... F. (2d) ...., and was dated June 9, 1943. As this brief goes to press the opinion has not yet appeared in the advance sheets.

II. JURISDICTION

1. The date of the judgment to be reviewed is February 5, 1943 (T. 41), affirmed by the Circuit Court of

(T. 94, 101)

Appeals June 9, 1943. Motion for rehearing was made June 19, 1943 and was denied July 2, 1943. (T. 101)

2. The statutory provisions which are believed to sustain the jurisdiction of this court are 28 U. S. C. A., Sec. 347, Judicial Code Sec. 240: Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Jan. 31, 1938, c. 14, Sec. 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926, and 28 U. S. C. A., Sec. 377, Judicial Code, Sec. 262, R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.

3. The following facts show that the nature of the case, and the rulings below were such as to bring it within the judicial provisions relied on.

Petitioner was born at Mount Vernon, Iowa, and was 28 years of age on February 7, 1943. (T. 64, 81). He registered under the Selective Training and Service Act of 1940 October 16, 1940, at Milwaukee, Wisconsin. (T. 60, 64). He filled out and returned the questionnaire (Gov. Ex. 2) sent him by Local Board No. 2, and at Series X thereof stated that he was conscientiously opposed to participation in war. (T. 60, 1) Thereafter he filed the special questionnaire for conscientious objectors, Form 47. (Def. Ex. A-1) (T. 71)

In July or August of 1941 the Local Board classified him in Class IV-ELS (T. 60), and on March 28, 1942 reclassified him in Class IV-E. (T. 60) No question of classification is involved in this case.

On June 30, 1942, the Director of Selective Service wrote the State Director for Wisconsin that the Director had taken the liberty of assigning the defendant to the camp for conscientious objectors at Merom, Indiana, to report July 21, 1942 (Defendant's Ex. A-11), and this letter was forwarded to the Local Board July 6, 1942. (Def. Ex. A-10)

On July 13, 1942 the Secretary of the Local Board wrote the State Director acknowledging receipt of the letter above, and stated that the registrant had moved back to Milwaukee, and requested instructions as to whether defendant would be assigned to a conscientious objector camp in the Milwaukee area, or if it was proper to direct him to report to the Board at Aurora, Illinois. (Def. Ex. A-9)

On July 15, 1942, the State Director wrote the Local Board acknowledging receipt of said letter, and suggesting

that no action be taken until advised further by the National Director. (Def. Ex. A-8)

On July 16, 1942, the National Director wrote to the State Director that the registrant, Order No. 3170:

> "is hereby assigned to work of national importance and by order of said Local Board per D. S. S. Form 50 will be delivered to:
>
> Camp Director — Merom Camp
> Merom, Sullivan County, Indiana
> on Aug. 24, 1942." (Def. Ex. A-7)

On August 7, 1942, the State Director wrote the Local Board:

> "The above registrant having been reported to National Headquarters as being in Class IV-E, and with his order number reached, is assigned to Merom Camp, Merom, Indiana, and is to be ordered to report for work of national importance on August 24, 1942, by you. (Def. Ex. A-6)

The record does not show that defendant ever consented to or accepted this or any such assignment.

On August 11, 1942, the Local Board sent to defendant a notice, Form 50, as follows:

August 11, 1942.

ORDER TO REPORT FOR WORK OF NATIONAL IMPORTANCE

The President of the United States,
To Walter Ford Gormly
(First Name) (Middle Name) (Last Name)
Home address 619 North 16th Street, Milwaukee, Wisconsin
Order No. 3170.
Greeting:

Having submitted yourself to a Local Board composed of your neighbors and having been classified under the provision of the Selective Training and Service Act of 1940 as a conscientious objector to both combatant and noncombatant military service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Merom Camp located at Merom, Indiana, in the State of Indiana.

The Selective Service System will furnish you transportation to the camp, provided you first go to your Local Board named above and obtain the proper instructions and papers.

You will, therefore, report to the Local Board named above at 10:00 A. M., on the 24th day of August, 1942.

You will be examined at the camp for communicable diseases and you will then be instructed as to your duties.

Willful failure to report promptly to this Local Board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940 and may subject you to a fine and imprisonment.

You must keep this form and take it with you when you report to your Local Board.

Louis Davlin, Member of Local Board.

The Local Board did not meet to authorize this so-called order nor vote to issue it. (T. 61, 73) Form 50 above was mailed to registrant because of instructions in defendant's exhibit A-6 above, dated Aug. 7, 1942. It was sent as clerical procedure, signed by a member. (T. 73)

Defendant did not report to Local Board No. 2 on August 24, 1942, (T. 60), but at the hour specified reported to the United States Attorney. (T. 83) He did not report at the Local Board on grounds of conscience. (T. 65)

On August 24th the Local Board sent to defendant a notice, Form 281, reading as follows: (omitting immaterial parts)

> According to information in possession of this Local Board, you have failed to perform the duty, or duties, imposed upon you under the Selective Service law as specified below. * * *
>
> (x) *Did not report to your Board for induction pursuant to Order to Report for Work of National Importance.*
>
> You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 10 A. M., on the 29th day of August, 1942.
>
> Failure to report on or before the day and hour

specified is an offense punishable by fine or imprisonment, or both.

(Signed) Louis P. Davlin,
Member of Local Board.

(Def. Ex. A-4)

On Aug. 28th the defendant wrote as follows:

Mr. Louis P. Davlin, Local Board No. 2
1126 W. Walnut St., Milwaukee, Wis.

Dear Sir:

I notified your office on June 22 that I could not conscientiously participate in the war effort to the extent of accepting induction into a Civilian Public Service Camp. For that reason I did not report on August 24 as instructed, but reported to the District Attorney's office instead, where I told them of the stand I had taken and gave them my address.

I will not report on August 29 as directed by you in the notice (to Registrant) of Suspected Delinquency.

Yours very truly, Walter F. Gormly.

(Def. Ex. A-3)

Thereafter, the defendant was indicted. (T. 2)

The indictment alleged that it was made at a regular January Term in the year 1942 of the District Court for the Eastern District of Wisconsin, and was endorsed by the clerk "Filed in open court October 1, 1942." (T. 2)

Merom Camp was established by Order No. 14 of the Director of Selective Service dated June 18, 1941, and the order provided:

> "The camp, insofar as camp management is concerned, will be under the direction of approved representatives of the National Service Board for Religious Objectors. Men shall be assigned to and retained in the camp in accordance with the provisions of the Selective Service Act and regulations and orders promulgated thereunder."

(Def. Ex. C (T. 68-69)).

The Court, however, may take judicial notice, Part 691, of the official regulations of Selective Service as the court below did. (T. 70) From these regulations it appears that no provision is made for registrants assigned to said camps to receive compensation; they are required to pay for their own board; they are subject to discipline as in a military

or penal camp, and are not under real civilian direction but are really under military direction and control. As to the work, technical direction is under the Soil Conservation Service of the United States Department of Agriculture. The National Director of Selective Service is Major General Lewis B. Hershey. (T. 76) Administrative and directive control of Civilian Public Service Camps is under the Selective Service System through the Camp Operations Division. (T. 69) The Chief of Camp Operations is Colonel of Field Artillery Lewis F. Kosch. (T. 71, 73) The Selective Service System is military, not civilian. The work done in C. P. S. camps is substantially the same as that in C. C. C. camps (T. 68), for which regulations were issued by the War Department. (T. 68).

The Court may take judicial notice of the fact that Congress has made no appropriation to make any payment of wages to those engaged in work of national importance under Section 5(g) of the Act. The Court may take judicial notice of the contents of the official publication of National Service Board for Religious Objectors offered as Defendant's Exhibit H, but on objection not received in evidence (T. 76). This Board is put in charge of camp management by defendant's exhibit C (p. 69). Camp Merom, at Merom, Indiana, is administered under the agency of the American Friends Service Committee, (pp. 19, 20) of this booklet. (Defendant's proffered Exhibit H). On page 9 of this official publication it is stated:

> Persons who serve under the Civilian Public Service program will receive no pay and in addition either they, or their religious group, will pay for their own maintenance and the general administration of the camps as an expression of their willingness to make sacrifices for the things they believe in.
>
> The Brethren, Quakers, Menonites and Catholics, as administrators of the camps, agreed with the government that they would assume the financial responsibility and that no person would be prohibited from assignment to camp because of inability to contribute to the cost of the program.
>
> * * *
>
> The Administration of the camps is under the direction of the American Friends Service Committee, the Brethren Service Committee, the Mennonite Cen-

tral Committee, the Association of Catholic Conscientious Objectors. Any other agency, or agencies, may be authorized to operate camps. * * *

P. 11:

When local boards are satisfied with the sincerity of a registrant and assign him to Class IV-E (the class for "work of national importance under civilian direction"), his name and address is submitted to the national headquarters of the Selective Service System at the time his order number has been reached.

The name is transmitted by the Selective Service System to the National Service Board for Religious Objectors which mails a questionnaire (Form NSB 101) to the registrant. This form should be completed and returned to 1751 "N" Street N.W., Washington, D. C., immediately as the information contained in the questionnaire is used as a guide in making assignments to Civilian Public Service camps. The National Service Board consults with the administrative agencies on the basis of the information on the questionnaire and then recommends to the Selective Service System the camp location to which the registrant should be assigned.

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The National Service Board, with offices in Washington, is the official representative of all of the cooperating agencies in dealing with the various branches of the United States Government. It handles complaints, appeal proceedings, establishment of new camps, the inspection service of operating camps, assignment of boys in co-operation with the administrative agencies, and attempts to interpret the position and philosophy of the religious pacifist to the Government and general public.

The National Service Board for Religious Objectors does not function in an administrative capacity. The administration of camps is in the hands of the various agencies represented on the National Service Board.

Existing Administrative Agencies are:

American Friends Service Committee, 20 South Twelfth Street, Philadelphia, Pennsylvania; Paul

J. Furnas, Director of Friends Civilian Public Service.

Association of Catholic Conscientious Objectors, 115 Mott Street, New York, N. Y.; Arthur Sheehan, Director of Catholic Civilian Public Service. Brethren Service Committee, 22 S. State St., Elgin, Ill., Harold Row, Director of Brethren Civilian Public Service.

Mennonite Central Committee, Akron, Pennsylvania; Henry A. Fast, Director of Mennonite Civilian Public Service.

While there is close co-operation between the four administrative agencies, each one is responsible for the administration and financing of its own camps.

The defendant never belonged to the religious organization called the Friends, but is a Methodist. (T. 82)

The court excluded two letters received by the defendant, one dated July 15, 1942 from the Director of Camp No. 14, Merom, Indiana, reading in part as follows: (T. 79)

We have just received word from the National Service Board for Religious Objectors that you will be coming to camp Tuesday, July 21, 1942.

Will you please let us know as soon as possible how you are coming and when and where we may meet you? In general, possibly the best terminal is Sullivan, Ind., a town about 12 miles from camp, where we can pick you up. You might pass this information on to your draft board for whatever use they may care to make of it.

We are situated on the banks of the Wabash River about 30 miles south of Terre Haute. Our work project is supervised by the Soil Conservation Service.

Doubtless you have already received information from the Service Board or the AFSC as to what clothing and other belongings you should bring with you to camp. If you have any further questions, please let us know. Your mail may be forwarded to you at "CPS Camp, Merom, Indiana."

We are enclosing a copy of our camp newspaper, The Plowshare. We're looking forward to seeing you.

Very truly yours,

Claude C. Shotts, Director.

Defendant's Exhibit M, a letter from the Director of Camp No. 14, dated February 3, 1943, was excluded. In this letter the Director answered some questions of petitioner. The letter reads in part as follows: (T. 80)

> The approximate cost of operating the CPS system is somewhere in the vicinity of $35 per month per man. If a man is able and willing to assume all or any part of his share of the expense in camp he is encouraged to do so. However, this matter of expense has nothing to do with the assignment or the acceptance of any man with a 4E classification. The entire CPS system is supported, or rather, underwritten by the various religious agencies and is financed through contributions from interested people. *The only compensation received by the men in CPS camps is a $2.50 per month allowance* for use in purchasing articles such as soap, razor blades, etc. Incidentally, I understand that some camps do not make it a general practice to give this allowance unless it is specifically needed. However, all of our Friend's camps still give the allowance. (Emphasis ours)

4. The cases believed to sustain said jurisdiction are as follows:

Lau Ow Bew vs. U. S., 144 U. S. 47; 125 S. C. 517.
U. S. vs. Gulf Refining Co., 268 U. S. 542; 45 S. C. 597, 598.
Holiday vs. Johnston, 313 U. S. 342, 550; 61 S. C. 1015, 1017.
Bowles vs. U. S., 318 U. S., 319 U. S., 63 S. C. 758, 912, 1323; 87 L. Ed.
U. S. vs. Johnson, decided June 7, 1943, 63 S. C. 1233.
Schneiderman vs. U. S., decided June 21, 1943; 63 S. C. 1333.
Bartchy vs. U. S., decided June 7, 1943, 63 S. C. 1206.
Falbo vs. U. S., Cert. granted June 21, 1943, 63 S. C. 1448.

III. STATEMENT OF THE CASE

The facts have already been stated in the preceding petition and they are hereby adopted and made a part

of this brief, as stated under I thereof and II(3) hereof (ante pp. 1, 2, 5-12).

IV. SPECIFICATION OF ERROR

1. The Court erred in holding that the powers of the Grand Jury had not expired prior to the indictment in this case. (T. 94, 96)

2. The Court erred in holding that the Local Board could issue an order without a meeting or vote, and that the issuance of the alleged order in question was purely ministerial. (T. 96-9)

3. The Court erred in holding that the assignment and order to report to Civilian Public Service Camp did not constitute involuntary servitude, and in holding that such internment and servitude may be imposed as a condition of exemption from military service. (T. 94-96)

4. The Court erred in holding that the Act in question does not establish religion and prohibit the free exercise thereof contrary to the Constitution. (T. 94, 96)

5. The Court erred in holding that Congress could delegate legislative and judicial powers to Director of Selective Service, Local Boards, and the National Service Board for Religious Objectors, and that the powers now attempted to be exercised over this defendant were not in excess of the powers delegated. (T. 94, 96)

6. The Circuit Court of Appeals erred in holding that the defendant received a fair and impartial trial in the United States District Court for the Eastern District of Wisconsin. (T. 94, 99, 100)

7. The Court erred in holding that the indictment need not negative the statutory exception. (T. 94, 96)

8. The Court erred in not holding the indictment void because vague and based on conclusions of the draftsman. (T. 94, 96)

9. The Court erred in holding that the denial of right of counsel by the Selective Service System is due process. (T. 94, 96)

10. The Court erred in holding that the jury was a fair sample of the community and fairly chosen. (T. 94, 96)

11. The Court erred in holding that the questionnaires compelled to be answered by defendant were not unreasonable searches which could not be used as evidence to convict the defendant. (T. 94, 96)

12. The Court erred in holding that the so-called order

to report was in form and fact an order within the meaning of the indictment. (T. 94 96-9)

13. The Court erred in not holding that the so-called order to report was superseded by a later order with which defendant in form complied. (T. 94, 6)

14. The Court erred in holding that an indictment basing a criminal charge upon a refusal to work under civilian direction is valid. (T. 94. 6)

15. The Court erred in holding that the order of the Draft Board is final and that the Court and jury could not inquire into its validity. (T. 94, 96)

16. The Circuit Court of Appeals erred in holding that the evidence was clear, beyond a reasonable doubt, that the defendant wilfully violated, and wilfully and unlawfully failed, neglected and refused to perform a duty of carrying out a direction given under the Selective Training and Service Act of 1940, as amended, and in effect so instructing the jury. (T. 94, 96)

17. The Court erred in holding the law and the evidence sufficient to support petitioner's conviction under Sec. 11 of the Selective Training and Service Act of 1940, and the regulations made thereunder, for knowingly and unlawfully failing, neglecting and refusing to carry out a direction claimed to have been issued by his Local Board to report to said Local Board for work of national importance as a conscientious objector. (T. 94, 96)

V. MATERIAL PORTIONS OF ACT AND REGULATIONS

Material Portions of the Selective Training and Service Act of 1940 are as follows:

Sec. 5 (g).

Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act,

be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

Sec. 10. Rules and regulations; Selective Service System.

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. * * *

On October 4, 1940, the President prescribed regulations for classification and selection and designated Lt. Col. Lewis B. Hershey to perform said duties under the act. On October 22, 1940, the President prescribed regulations for delivery and induction. On February 6, 1941, the President authorized the Director of Selective Service to establish work of national importance under civilian direction for persons conscientiously opposed to war, and on the same day prescribed camp regulations. On April 11, 1941, the President authorized the establishment of work of national importance for those opposed to war. On September 3, 1941, the regulations on classification and selection were revised.

The regulations provide among other things, at the section numbers shown below, as follows:

603.56 Organization and meetings.

The board shall elect a chairman and a secretary. A majority of the board shall constitute a quorum for the transaction of business. A majority of those present at any meeting shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. * * *

603.59 Signing official papers.

Official papers issued by a local board may be signed by the clerk "by direction of the local board" if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board, provided that the chairman or a member of a local board must sign a particular paper when specifically required to do so by the provisions of a regulation or by an instruction issued by the Director of Selective Service.

622.51 Class IV-E: Available for work of national importance; conscientious objector.

(a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service. * * *

625.2 Appearance before local board.

* * * If the registrant does not speak English adequately, he may appear with a person to act as inter-

preter for him. No registrant may be represented before the local board by an attorney.

652.1 Report of conscientious objector to Director of Selective Service.

(a) When a registrant in Class IV-E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction. * * *

(c) Until such time as his defects have been corrected, no Conscientious Objector Report (Form 48) shall be filled out or used for a registrant who, according to the report of the examining physician, will be qualified for general service after satisfactory correction of specified remediable defects.

652.2 Assignment by Director of Selective Service.

(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant * * * shall assign the registrant to a camp.

652.11 Preparation and distribution of Order to Report; delinquent of IV-E registrants.

(a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV-E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Armed Forces' Original, the Surgeon General's Copy, and the National Headquarters' Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Local Board's Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53). * * *

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

653.1 Work projects.

(a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all work projects is vested in the Director of Selective Service.

653.2 Camps.

(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a Federal technical agency using funds provided by the Selective Service System and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service.

653.3

(d) When the National Service Board for Religious Objectors has been authorized to operate a camp, it shall assume the entire financial responsibility for the wages of the camp director and other employees, the clothing, feeding, housing, medical care, hospitalization, welfare, and recreation of assignees and all other costs of operating the camp. * * *

653.12 Duties.

Assignees will remain in camp until released by proper authority; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed from time to time by the Director of Selective Service.

653.14 Final release.

(a) Each assignee who completes his period of active participation in work of national importance under civilian direction shall receive a Certificate of Release from Active Participation in Work of National Importance under Civilian Direction (Form 45). * * *

(b) Each such assignee after the completion of his period of service shall be transferred to a reserve until he attains the age of 45, or until the expiration of 10 years after he is transferred to such reserve, or until he is discharged from such reserve, whichever shall occur first, and shall, during such period, be deemed to be a member of such reserve and shall be subject to such additional participation in work of national importance under civilian direction as may now or hereafter be prescribed by law. Such assignee will be retained in Class IV-E by the local board.

691.1 Camp responsibility.

The National Service Board for Religious Objectors will appoint the camp director. The camp director will be responsible for all phases of camp operations, including maintenance of the camp and its environs and watchman service in accordance with standards acceptable to the technical agency directing the work project. He shall also be responsible for the reception, feeding, housing, clothing, recreation, education, health, and camp life of the assignees.

691.14 Welfare and recreation.

The Welfare and recreation of assignees is the direct responsibility of the camp director. * * *

691.15 Education.

The educational program for assignees will be the responsibility of the camp director. He may avail himself of such volunteer services as may be provided by members of the technical agency staff attached to the camp. On-the-job training will be a definite responsibility of the project superintendent of the technical agency.

691.16 Furloughs and liberty.

(a) The camp director, with the concurrence of the project superintendent of the technical agency, may grant furloughs to an assignee at such times as he may be spared from his duties. No assignee may receive a furlough or furloughs in excess of a total of 30 days in any one year, including furloughs for special religious holidays and periods of convalescence following illness or injury. Such furloughs shall include week ends and holidays falling within the period of furlough. The camp director may temporarily restrict or suspend the granting of furloughs to any or all men assigned to a project whenever in his opinion circumstances render such restrictions or suspensions desirable. The number of assignees on furlough at any one time will in no event exceed 15 percent of the total number of assignees in such camps.

(b) Liberty or leave regulations covering the hours outside of work hours may be issued from time to time by the camp director who may prescribe hours assignees may be away from the camp and how far they may go from camp. Week-end leave must be confined between noon on Saturday and 6 A.M., Monday. A sufficient number of assignees will be maintained at the camp to provide for watchman service and fire protection at all times.

691.17 Discipline.

(a) An assignee who fails to perform the duties outlined in section 653.42 or whose conduct amounts to a violation of local, State, or Federal criminal statutes, or to violation of the rules and regulations herein set forth, will be subject to such fines, restriction of privileges, extra duty, additional service, reclassification under the Selective Service Regulations, or prosecution under the Selective Training and Service Act of 1940, as amended, as the case may warrant. * * *

(d) If, after reporting to the camp, an assignee is absent without leave for a continuous period of 10 days, he will be deemed to be a deserter. On the 11th day the Director of Selective Service will be notified through regular channels and may take the necessary steps to report the assignee to the proper United States attorney as a violator of the Selective Training and Service Act of 1940, as amended.

(e) Refusal to work or perform other assigned duties, inciting others to refuse to work or perform assigned duties, or failure to abide by the rules and regulations promulgated by the camp director, will constitute a violation of these rules and regulations.

A full and immediate report of such violation of these rules and regulations will be made to the Director of Selective Service through regular channels. If the reported conduct indicates that the assignee may have been improperly classified, the Director of Selective Service may take the necessary steps to submit the information to the assignee's local board with a request that the assignee's case be reopened and his classification considered anew under the Selective Service Regulations. The Director of Selective Service may also report the assignee to the proper United States attorney as a violator of the Selective Training and Service Act of 1940, as amended.

(f) Loss of time over 24 hours because of the assignee's absence without leave, sickness or injury due to his own misconduct, confinement by civil authorities following conviction, or willful failure to perform duties, must be made up; provided that no assignee may be retained in camp longer than his maximum period of service as prescribed by law.

(g) The camp director may make and enforce such rules as he may deem appropriate for the operation of his camp and the carrying out of these regulations, and he has wide latitude in imposing such disciplinary action as he may deem necessary. * * *

691.22 Hours of work.

The hours of work on the project will be determined by the technical agency. No limitation is set on the number of hours that an assignee may be required to work in any given day or week. Forty-four hours per week shall be the minimum that any assignee shall work. Travel time

shall not be included in computing the 44-hour minimum, except the portion thereof which exceeds 1 hour in any one day. In case the camp director of a camp does not agree as to the hours of work on the project, all facts in the case will be reported through the National Service Board for Religious Objectors to the Director of Selective Service for final decision. Assignees will be subject to emergency calls by the project superintendent of the technical agency on any day or night at any hour for the purpose of fighting forest fires or other emergencies affecting life or property.

VI. OPINION IN U. S. vs. MROZ

The opinion below (p. 3) (T. 96) refers to its opinion in *U. S. vs. Mroz*, decided June 3, 1943. We set out the opinion below, so far as material to the present case. Before Evans, Sparks and Major, Circuit Judges.

EVANS, *Circuit Judge.* This appeal involves a conviction for violation (Sec. 311 of 50 U. S. C. A.) of an order of a local (Milwaukee) draft board to defendant to report for transportation "for work of national importance, as a conscientious objector," which order was issued under authority of the Selective Service Act. (50 U. S. C. A. Sec. 301.) * * *

The oral argument of counsel at the hearing before this court was vehement in deriding the Selective Service Act and its administration. He contended, among other things, that military service constituted slavery and involuntary servitude in violation of the Thirteenth Amendment to the Constitution. To a greater degree, he argued, was the Selective Service Act violative of Amendment XIII and more clearly constituted involuntary servitude when applied to "a minister" who had conscientious objections to war, yet was sent to a camp *without pay.*

Expiration of Term of Court. Defendant argues that the term of court at which the grand jury was called had closed before the indictment in question was returned. In other words, the authority of the grand jury to act ceased before it voted the indictment against defendant.

The appellant relies on this court's decision in *U. S. vs. Johnson*, 123 F. 2d 111. While this case is still pending in the U. S. Supreme Court, it is readily, in point of fact,

distinguishable from the case before us. It may therefore be dismissed without a consideration of its holding.

Counsel's argument is predicated upon the assumption that the statutory January Term, 28 U. S. C. A. Sec. 195, of court at Milwaukee terminated because the statutory terms of court at Oshkosh and Green Bay, begin in June and April, respectively, and since there is but one judge to hold all three courts and he can be in but one place at a time, the term of court at one place must *ex necessitae* close in order that the term at the next designated place may begin.

This argument has been before several courts and rejected by all. In 1910, the Supreme Court said, in *Harlan vs. McGourin,* 218 U. S. 442,

> "We think the purpose of the law was to provide for statutory terms of court for the Northern District of Florida, beginning on the first Monday of February and March respectively, which term should continue until the beginning of the next term, *unless finally adjourned in the meantime.* Such is the general and recognized practice in the Circuit Courts of the United States. * * *
>
> *"There was certainly no adjournment of the court for the term when the judge was absent holding court at Tallahassee,* or was out of the state." (Italics ours.)

In *U. S. vs. Perlstein,* 39 F. Supp. 965, Judge Maris stated:

> "The conclusion has uniformly been reached that unless sooner adjourned *sine die* a stated term of court regularly opened at a time and place fixed by statute continues until the time fixed by law for the convening of the next term at the same place even though a term has commenced in the meantime at another place in the district. (citing cases.)" (This case was affirmed without passing on this point in 126 F. 2d. 789, certiorari denied, 316 U. S. 678.)

And in *U. S. vs. Rasmussen,* 95 F. 2d. 842 (C. C. A. 10), the court said:

> "A term of court does not automatically expire until the time fixed by law for the convening of the next term *at that place* unless an order is entered expressly adjourning it sooner, even though terms may begin at other places in the meantime." (Italics ours.)

The distinction which appellant attempts to make as to these and other cases, *Bronson vs. Schulten,* 104 U. S. 415; *East Tenn. Iron Co. vs. Wiggin,* 68 F. 446; *Petn. of Thomas Towboat Co.,* 23 F. 2d. 493; *Denver Livestock Co. vs. Lee,* 18 F. 2d. 11, 13; *Florida vs. Charlotte Harbor Co.,* 70 F. 883, namely, that there may have been a plurality of judges in such districts whereas in Wisconsin there is but one judge in the district, is unimportant, when it comes to construing the statutorily designated terms, having a specific commencement but no fixed termination. The aim of the statute was to provide a definite time for judicial service in each community having need of it, not to automatically terminate by inference a term expressly and specifically created by the same statute.

On the merits of this appeal a mere listing of appellant's grounds for reversal suggests triviality of merits. (*Arver vs. U. S.* (Selective Draft Law Cases), 245 U. S. 366; *Goldman vs. U. S.,* 245 U. S. 474; *Cox vs. Wood,* 247 U. S. 3; *Ruthenberg vs. U. S.,* 245 U. S. 480; *U. S. vs. Macintosh,* 283 U. S. 605; *U. S. vs. Williams,* 302 U. S. 46; *Hamilton vs. Regents,* 293 U. S. 245). It must be borne in mind that the charge upon which the criminal sentence was imposed was a failure to obey an order of his local draft board for transportation to a conscientious objectors' camp. That appellant received the order, is conceded; that he intentionally disobeyed the order is clear. The Board issued its order only after it had been directed so to do, following an appeal of his case by appellant.

We cannot ignore the seriousness of the issues which defendant presents. His challenge, if successful, would jeopardize the country's defense in time of war. That may have been defendant's object, or his action may have resulted from an over exaltation of self and minimization of the obligation of a citizen to society. Whatever his mental reaction to a war status may have been, the result is the same. Defiance of the authority and a resulting expression of duty and obligation of citizen to his government.

That such expression of government and of citizen duty may be old and well recognized among nearly all good citizens of the land seemingly counts for little with those who write in large letters the duty of government to preserve itself and protect its citizens in time of war, but to exact nothing from citizens whose personal interest or

convictions are not in accord with the government's adopted policy. * * *

Appellant's clear and unqualified duty was to comply with his draft board's order. He cannot "take the law into his own hands" and render himself invulnerable to consequencies. The draft machinery has been legally (50 U. S. C. A. Sec. 301, et seq.) set up, and it is not for the individual to constitute himself judge of his own case.

Other circuits have dealt with similar questions. Judge Parker of the Fourth Circuit dealt with a similar case in *Barley vs. U. S.*, decided April 8, 1943.

In the margin are set forth additional quotations of pertinent authorities. (*U. S. vs. Kauten*, 133 F. 2d. 703 (CCA 2); *Selle vs. U. S.*, 133 F. 2d. 1015 (CCA 8). *U. S. vs. Grieme*, 128 F. 2d 811 (CCA 3); *Rase vs. U. S.*, 129 F. 2d. 204 (CCA 6); See also *Buttecali vs. U. S.*, 130 F. 2d. 172 (CCA 5); *Goff vs. U. S.*, decided May 4, 1943 (CCA 4); *Honaker vs. U. S.*, decided same day by the same circuit; *Johnson vs. U. S.*, 126 F. 2d. 242; *Fletcher vs. U. S.*, 129 Fed. 2d. 262.)

The Act itself (50 U. S. C. A. Sec. 310 (a) (2)) provides:

> "The decision of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

Appellant dwells on lack of a due process hearing, and on arbitrary and capricious action. He seemingly fails to realize that war is realistic, that the emergency requires immediate mobilization of a large manpower; that each case must be handled individually yet speedily. The Act provides for the administrative set up to handle this titanic task expeditiously. Each individual answers his questionnaire, and can supplement it with any other evidence he wishes to present in support of his claimed exemption. If the Board's ruling be adverse to him, he may appeal, as appellant did, and the Regulations provide for a reference in the case of conscientious objectors. Such a reference was had, and an extended hearing took place in which appellant participated.

It was determined by that referee and by the Appeals Board, unanimously, that appellant should be classed as a conscientious objector but not as a duly ordained minister. The authorized administrative machinery passed upon

this man's case individually and concluded he was not a minister within the meaning of the Act, but, since he was opposed to combatant and non-combatant service, he should be considered a conscientious objector. He received all the consideration the emergency of the situation permitted, and the administrative tribunals' decisions have placed him in a category where his valued life is safer than that of many of his fellow citizens.

We are confident (at least we are hopeful) that mature reflection will cause a modification of counsel's opinion of the Selective Service Act and its administration. It is hard to conceive of any government at war dealing more considerately with its citizens who express conscientious objections to war, and especially so, where the citizen for the first time voiced such sentiment and claimed to be a full-fledged minister after war was declared, and he had been called by the draft.

Judgment is Affirmed.

VII. ARGUMENT

SUMMARY OF ARGUMENT

A. The Circuit Court of Appeals decides federal questions in a way probably in conflict with applicable decisions of this court.

Point 1. An unconstitutional condition cannot be imposed as the price of a privilege.

Point 2. By the Act, Congress unlawfully delegates its powers and the President and the Director of Selective Service have exceeded the powers delegated.

Point 3. Act unconstitutionally delegates judicial powers to an administrative body.

Point 4. Indictment lacks definiteness, and it and the subsequent proceedings below are void because the Act does not set up an ascertainable standard of guilt.

Point 5. Indictment and all subsequent proceedings below are void because the indictment does not negative the statutory proviso.

Point 6. Failure of defendant to report was not wilful.

Point 7. Provision in the regulations that no registrant may be represented by counsel is lack of due process.

Point 8. Indictment was returned too late and is void.

B. The Circuit Court of Appeals decides an important question of general law in conflict with the weight of authority.

Point 9. So-called order signed by one member, without action or vote of the Board is illegal and the indictment and subsequent proceedings below founded thereon are void.

Point 10. Alleged order is void because it violates petitioner's rights under the First Amendment.

Point 11. Defendant did not receive due process and fair trial as required by Constitution and law of the land.

C. The decision of the Circuit Court of Appeals is at variance with decisions of another circuit.

Point 12. Ruling that an order of a Local Board may not be questioned as to its validity is not good law and conflicts with *Johnson vs. U. S.*, 126 F. (2d) 242, *Rase vs. U. S.*, 129 F. (2d) 204, and *Baxley vs. U. S.*, 134 F. (2d) 998, 999.

A. The Circuit Court of Appeals decides federal questions in a way probably in conflict with applicable decisions of this court.

1. *An unconstitutional condition cannot be imposed as the price of a privilege.*

By Sec. 5(g) of the Selective Training and Service Act of 1940, it is provided that nothing therein shall be construed to require any person to be subject to training and service who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form, and that any person claiming exemption because of such objections shall be assigned to work of national importance under civilian direction.

The regulations, at Sec. 652.2, provide that the Director of Selective Service shall assign the conscientious objector to a camp; at Sec. 653.12, that a person so assigned shall remain in camp until released; and at Sec. 653.14(b), when released shall be transferred to a reserve for 10 years, or until he attains 45 years of age, or until he is discharged, whichever occurs first, and shall be subject to such additional participation in work of national importance as may now or hereafter be prescribed by law. By regulation (Sec. 691.1) it appears that defendant is to be sent to a camp in charge of a Camp Director appointed by the National Service Board for Religious Objectors; that his welfare and

education are to be supervised (Sec. 691.14-5); that he is to have only such freedom as the Camp Director may allow, such as furloughs, liberty and leaves (Sec. 691.16); that prolonged absence from camp make him a deserter and that he is subject to "such disciplinary action" as the Camp Director may "deem necessary" (Sec. 691.17).

By Sec. 691.22 hours of work are provided to be fixed by the technical agency without consulting defendant, as assignee, and no limitation is set upon the number of hours that an assignee may be required to work, except the minimum of 44 hours. In case the Camp Director objects to the hours of work the facts are to be reported to the Director of Selective Service for final decision. As shown by Defendant's proffered Exhibit M, the only compensation received by men in Civilian Public Service Camps is $2.50 a month allowance for incidentals, not as compensation.

The Court will take judicial notice that no real monetary compensation is paid to assignees in Civilian Public Service Camps, and that they are required to pay their own board, unless it is furnished to them by some charitable organization, and that their earnings, if any, are not paid to them, but are transferred to the general funds of the United States.

The record sufficiently shows that defendant, if assigned to such camp, would be subjected to involuntary servitude for the duration of the war and for such longer period as is envisaged by Reg. 653.14(b).

Amendment XIII to the Constitution of the United States provides that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This amendment has been held to be self-executing. As defendant was to be sent to Merom in the State of Indiana his proposed servitude was to be within the United States. The "work" for which the defendant was required to report by the order in question is involuntary servitude within the amendment. It has all the indicia of the most flagrant sort: 1. Assignment to labor by an order to which defendant did not consent; 2. Place of employment fixed without consent of defendant; 3. Hours of labor fixed without his consent; 4. A sophistical limitation on the hours of labor; 5. No freedom outside of working hours except by permission of some overseer; 6. Subjection to disciplinary action

at whim or discretion of Camp Director; 7. Inability, voluntarily, to quit or change job; 8. Imprisonment in a camp; and 9. No compensation.

The work in question is involuntary servitude within the meaning of the following cases:

Ex Parte Wilson, 114 U. S. 417; 5 S. C. 935; 941; 29 L. Ed. 89.

Slaughter House Cases, 83 U. S. 36; 16 Wall. 36; 21 L. Ed. 394.

Hodges vs. U. S., 203 U. S. 1, 17; 27 S. C. 6, 8; 51 L. Ed. 65.

Taylor vs. Georgia, 315 U. S. 25; 62 S. C. 415, 417.

Involuntary servitude is defined in *Black's Law Dictionary* as "the condition of one who is compelled by force, coercion, or imprisonment and against his will to labor for another whether he is paid or not."

The servitude involved in Civilian Public Service Camps is not like jury duty, road building and similar services sometimes required of a citizen, in that such duties are paid for either in cash or by release of taxes, and do not take the entire time of the person involved, and are subject to release for (and often without) cause, and do not interfere with the subject's "regular business." Services in the Army or militia are also distinguishable and have been justified on the ground of the power of the federal government to raise armies.

Arver vs. U. S. 245 U. S. 366; 38 S. C. 159.

Such action was previously justified on the ground that the person called to military duty could furnish a substitute.

Booth vs. Woodbury, 1864, 32 Conn. 118.

In this manner, persons upon whom the draft might fall with particular severity could equalize his burden by furnishing a substitute. The present act expressly forbids such relief.

The *Arver case, supra*, was dismissed with the statement that the objection would seem to be too frivolous for further notice, thus raising doubt as to rationale and justice of the opinion. However erroneous we may regard that decision to be, this case is not governed by the *Arver case*, and is distinguishable because the involuntary servitude here involved is not necessary to or for the purpose of raising armies. It has long been recognized that the exer-

cise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the Federal Constitution.

U. S. vs. C. M. ST. P. & P. R. R. CO., 282 U. S. 311, 328, 329; 51 S. C. 159.

FROST & FROST TRUCKING COMMISSION vs. RAILROAD COMMISSION, 271 U. S. 583, 93-9; 46 S. C. 605; 70 L. Ed. 1101; 47 A. L. R. 457.

HANOVER INS. CO. vs. HARDING, 272 U. S. 494, 507, 8; 47 S. C. 179; 71 L. Ed. 372; 49 A. L. R. 713.

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1, 47, 48; 30 S. C. 190; 54 L. Ed. 355.

Western Union Telegraph Co. vs. Foster, 247 U. S. 105, 114; 38 S. C. 438; 62 L. Ed. 1006; 1 A. L. R. 1278.

As the court says in the first case cited, the grantee may ignore the enforcement of the condition without losing the grant. (282 U. S. 311, 328). Such being the case, and the grantee of the exemption having the right to ignore the condition, such right is an absolute defense to criminal prosecution.

This issue was raised throughout the trial by the demurrer and motion to quash, paragraph 2 and 3 (T. 17); by the plea in abatement, paragraphs 3, 4, 9, (T. 23, 25); plea in bar, paragraph (h) (T. 28); requested instructions, paragraphs 12, 13, 14, 15, 16, 17 (T. 32); argument to the jury (T. 86); assignment of errors, paragraphs 39, 40, 41, 42, 43, 44, and 46. The court below, in the second paragraph of the opinion at point 3, notes that defendant claims the judgment should be reversed on this ground, and says: (T.

> "Other grounds are advanced which we do not specifically state or discuss as they are clearly without merit."

In the third paragraph of p. 3 the Court says this point (T. 3 (and 4 others) were sufficiently treated in U. S. vs. Mroz, decided by it June 3, 1943, set forth above. In fact the point was not there treated at all.

In the ninth paragraph of the opinion (second quoted (p. herein) the court below says that counsel "was vehement in deriding the Selective Service Act and its administra-

tion." As a matter of personal privilege we here deny this statement. Counsel has at no time ridiculed the Act, the Regulations, or the Selective Service System. Counsel has at all times earnestly and seriously attacked the constitutionality of the Act and Regulations here involved, and the validity of the powers attempted to be exercised by the administrative agencies thereunder. Counsel has not contended "that military service constituted slavery and involuntary servitude," but only that involuntary induction may be.

With this unfavorable introduction of the issue into its opinion the Court fails to discuss or reason, and so far as we discover does not treat the issue at all.

The Court discusses one or two grounds of error raised, and says, (p. 6): (T. 99)

> "Other contentions made by counsel for defendant have been considered and all are objected ~~to~~. We are referring to only one to illustrate how void of merit they are."

At no point in the opinion is the issue so seriously and earnestly raised discussed by the court. Issues involving the liberty of an American citizen are not thus lightly to be brushed aside.

2. *By Act, Congress Unlawfully Delegates its Powers and President and Director of Selective Service Have Exceeded Powers Delegated.*

The Act provides that in lieu of induction a conscientious objector may be assigned to work of national importance, and the President is authorized to prescribe rules and regulations to carry out the Act.

In *Field vs. Clark*, 143 U. S. 649; 12 S. C. 495; 36 L. Ed. 294, cited in the *Arver case, supra*, the court said (p. 504):

> That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.

In that case it was found that there was nothing involving expediency or the just operation of legislation left to the President, and that direction (p. 505) "to make law is distinguishable from that of execution." Whether an act unlawfully delegates legislative power or the exercise of the delegated power exceeds that conferred, must depend

upon the facts of each particular case. The violation, if any, cannot be affirmed or denied merely on the citation of other cases, as was done in the *Arver case*. While the Act provided that a conscientious objector might, in lieu of induction, be assigned to work of national importance under civilian direction, the standards set up by the Act are insufficient to constitute a framework within which the executive branch of the government can operate. It is not clear how Congress, limited in its power to the raising of armies, can delegate to the President the power to induct for work other than army work. The Act clearly exempts the conscientious objector from the army, the limit of Congressional power. The Act does not set up any standard for determining what is work of national importance, nor what is civilian direction.

Upon this narrow and uncertain basis the President and the Director of Selective Service, through the Regulations, orders and "directives" have legislated a system whereby conscientious objectors have their exemption converted to a penalty are torn from their places of residence and placed in camps without a word in the Act to indicate that such was the intent of Congress. If the Act can be interpreted as authorizing such imperious regulations, it delegates powers of a most devastating nature and must be held beyond the power of Congress to enact.

3. *Act Unconstitutionally Delegates Judicial Powers to an Administrative Body.*

In *Arver vs. U. S.*, 245 U. S. 366; 38 S. C. 159, 165, the Court cites several decisions as if by authority the claim of illegal delegation of judicial power could be disposed of. In fact, each such claim of delegation must be considered on its own merits, and cannot be disposed of by mere citation of authority of other cases which were held not to involve unconstitutional delegation.

In *Wong Wing vs. U. S.*, 163 U. S. 228; 16 S. C. 977, it was admitted Congress might prevent aliens from coming into the country, but held that the provisions of the Congressional Act that Chinese persons, summarily, and without judicial trial, convicted of unlawful entry should be imprisoned at hard labor for not more than one year and thereafter removed from the United States, inflicted an infamous punishment contrary to the Fifth and Sixth Amendments to the Constitution. The Court conceded that

some detention or temporary confinement might be necessary to give effect to the exclusion or expulsion of aliens, and said (p. 980):

> But the evident meaning of the section in question * * * is that the detention provided for is an imprisonment at hard labor, which is to be undergone before the sentence of deportation is to be carried into effect, and that such imprisonment is to be adjudged against the accused by a justice, judge, or commissioner, upon a summary hearing.

The Court held the imprisonment provisions unconstitutional, saying (p. 981):

> But when congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

The Act now in question proposes to assign defendant to a camp at hard labor upon a mere ministerial act of the Selective Service administration for an indefinite period, presumably for the duration of the present war, and six months thereafter, merely because petitioner is a conscientious objector to war. No trial is provided. Since the Act makes provision for such imprisonment at hard labor without judicial process, it is unconstitutional under the authority of the case last cited.

The Act merely says that the conscientious objectors shall "be assigned to work of national importance under civilian direction." It does not give the President, the Director of Selective Service, the Local Boards, or any other person or agency power to imprison petitioner at hard labor with loss of liberty and without compensation. The regulation, therefore, is in excess of the powers conferred under the Act, and the indictment and all that followed in the courts below is invalid and the judgment should be reversed. The regulations, if they can be said to be authorized by statute, then violate Amendment Six to the Constitution of the United States providing:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, * * *."

The provision also violates Art. I, Sec. 9 of the Constitution, providing:

> "No Bill of Attainder or ex post facto Law shall be passed."

In "Constitution of the United States of America," Annotated to January 1, 1938, published by the Government Printing Office, it is said (p. 281):

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties. * * *"

Since the regulation in question, if authorized by Congress, inflicts legislative punishment upon conscientious objectors without judicial trial, the regulations, with respect to assignment to Civilian Public Service camps, as and if law, is a bill of pains and penalties and is unconstitutional and void.

CUMMINGS vs. MISSOURI, 4 Wall. 277, 323.
PIERCE vs. CARKSADON, 16 Wall. 234.

The constitutional objection to the internment of defendant in the Civilian Public Service camp is aggravated by the fact that the offense consists in entertaining an opinion based on "religious training and belief" (Act, Sec. 5(g)), and not upon any overt act of a recognized criminal nature.

This attempt by Congress, through the regulations, to confer judicial power upon the Local Draft Board and the Director of Selective Service, operating through his delegates, the National Service Board for Religious Objectors, and others, is an exercise of judicial power required by Art. III, Sec. 1 to be vested in courts of law. The assignment of defendant to a Civilian Public Service camp is and was a deprivation of his liberty, and internment in prison or confinement in a jail because of conscientious convictions based upon religious training and belief, and therefore void.

DEN EX DEM MURRAY vs. HOBOKEN ILL. CO., 18 How. 272; 15 L. Ed. 372.
U. S. vs. JU TOY, 118 U. S. 253; 49 L. Ed. 1040.

4. *Indictment lacks definiteness, and subsequent proceedings below are void because the Act does not set up an ascertainable standard of guilt.*

The indictment, and the law upon which it is based, cannot be so vague as not sufficiently to specify and create an ascertainable standard of guilt. The Act in question, as well as the regulations and order purporting to be issued thereunder, and the indictment founded thereon, are too indefinite to create a standard of guilt in that the Act contains no provisions and no standards upon which a reasonable regulation may be based as to the following particulars:

a. Nature of the work; b. Place of work; c. Hours of work; d. Compensation; e. Supervising agency or personnel by whom assigning is to be done; f. Nature of the assignment; g. Requisites as to consent of assignee; h. Tests of work of national importance as distinguished from combatant and non-combatant service in the land and naval forces; and i. Definition of work of national importance under civilian direction.

The whole provision of the Act bound up in the words "be assigned to work of national importance under civilian direction" is too vague and uncertain to provide an ascertainable standard of guilt. There is no authority in the Act to require any person to do work away from his usual place of habitation; to uproot him from his family and take him away from the place where his property and life savings may be invested; to require him to perform one class of work of national importance when he is already performing work of another class of equal national importance; to require him to leave work under civilian direction to be confined twenty-four hours of the day under a military or penal regime at least in part; and there is no provision in the Act or regulations that any person or agency may issue an order requiring any assignment to be fulfilled where the assignee declines to accept the assignment.

"Work," in the common American acceptation of the word, means work of the free born, or free man. Congress, in using the word "work," must have used it in the common sense of work under American conditions of freedom. Work and slavery are not synonymous and the attempt to impose upon conscientious objectors work under slave conditions does not meet the statutory intent and meaning of the word "work" as used in Sec. 5(g) of the Act. Congress, of course, was free to ignore the ordinary meaning of the word "work," and make a definition of its own, provided the

device be not used to change the nature of the thing to which the word is applied.

CARTER vs. CARTER COAL CO., 298 U. S. 238, 289; 56 S. C. 855, 863.

Congress did not, however, indicate that it was using the word "work" in any other than its ordinary meaning.

In Defendant's Ex. H, refused admission, the National Service Board for Religious Objectors states, (p. 8):

> "The present program gives the religious groups of America an opportunity to demonstrate in a practical way their faith in a type of life that does away with the necessity of war. It presents a great responsibility and a challenge to show that they are prepared to make financial sacrifices to support the things they hold precious in our democracy."

We presume that there is no doubt that the high-minded gentlemen who devised the arrangements whereby Civilian Public Service camps were set up were actuated by benevolent purposes. This court, however, has, in the last case cited, expressly stated that beneficent aims, however great, can never serve in lieu of constitutional power. (298 U. S. 238, 291, 56 S. C. 855, 864)

Sec. 652.1 of the regulations does not in fact supply the omissions of the Act with respect to any authority to make orders transporting defendant or any other assignee from his usual place of employment to these concentration camps, known as Civilian Public Service camps.

Since the Act, the regulations, and the indictment are void, the judgment should be reversed.

U. S. vs. COHEN GROCERY CO., 255 U. S. 81; 41 S. C. 298.

WEEDS vs. U. S., 255 U. S. 109; 41 S. C. 306.

The former case is also authority for the rule that war does not suspend the limitations of the Constitution.

The language of the Court below, in its opinion, (p. 7) (7.) says:

> "Unfortunately defendant is not the only one of the group which is determined not to take up arms in their country's defense. Much time is taken in an effort to make clear the issue which confronts the citizen who refuses to obey the command of his government. Perhaps it is wasted time."

This language indicates lack of sympathy by the Court with the provisions of Sec. 5(g) of the Act. It suggests that the Court believes that in time of war the Constitution is suspended and that the government may command its citizens, including the defendant. This Court should take jurisdiction of this case in order that a clear enunciation may be made of the duties of courts in time of war to protect the constitutional liberties of United States citizens. If such liberties are to be retained in time of peace, they must be protected and defended in time of war.

5. *Indictment and all subsequent proceedings below are void because indictment does not negative statutory proviso.*

The Act, at Sec. 5(g), provides that a person found to be conscientiously opposed to participation in non-combatant service shall, in lieu of induction, be assigned to work of national importance under civilian direction. The indictment (T. 2) does not allege that the assignment in question was in lieu of induction, nor did it recite that the work was to be under civilian direction. Since, in the very nature of the case, a conscientious objector who declines to engage in non-combatant service is, by religious training and belief, conscientiously opposed to accepting service under military direction, it is of the essence of the Congressional exemption that the work for which assignment is suggested be under civilian direction. This proviso for civilian direction is so inherent in the Congressional exemption and so closely incorporated therein that the indictment founded upon the statute must allege enough to show that the assignment alleged in the indictment conformed to the Congressional proviso. Possibly the reason the language was omitted from the indictment, which in other respects followed the statute, is that the work at Civilian Public Service camps is not entirely under civilian direction as the regulations and discussion in this brief indicate. Since the indictment is defective the judgment should be reversed.

U. S. vs. COOK, 17 Wall, 168, 182; 21 L. Ed. 538, 539.

6. *Failure of defendant was not wilfull.*

The defendant, having disobeyed the so-called order notifying him to report, was acting as required by the dictates of his conscience. (T. 65, 74) His failure was not

wilfull within the meaning of the indictment as is shown by the fact that he reported to the United States Attorney at the hour fixed (T. 83), and upon receipt of notice of delinquency responded by letter. Accordingly, defendant's act was not wilfull within the meaning of the indictment.

U. S. vs. MURDOCK, 290 U. S. 389, 395; 54 S. C. 223, 226.

7. *Provision in the regulations that no registrant may be represented by counsel is lack of due process.*

The regulations provide at Sec. 625.2(a) that "No registrant may be represented before a Local Board by an attorney." This provision stamps the Selective Service System as lacking in respect for the ordinary rights of registrants over whom it assumes to exercise authority, and is void as a denial of due process. The local board or its clerk in this case refused to permit petitioner's lawyer to examine defendant's records in the Board.

POWELL vs. ALABAMA, 287 U. S. 45, 68, 69.

COOKE vs. UNITED STATES, 267 U. S. 517, 527.

FELTS vs. MURPHY, 201 U. S. 123, 129.

8. *Indictment was investigated, voted and returned too late.*

By 28 U. S. C. A., Sec. 195, it is provided the terms of the District Court for the Eastern District of Wisconsin, shall be held at Milwaukee on the first Mondays of January and October; at Oshkosh on the second Tuesday in June; and in Green Bay on the first Tuesday in April.

By 28 U. S. C. A., Sec. 421, it is provided, among other things:

> A district judge may upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than 18 months."

The jury in this case was empaneled at the January Term 1942 of the District Court for the Eastern District of Wisconsin (T. 2), and the indictment was not returned and filed in open court until October 1, 1942. (T. 2)

The alleged order which the defendant is charged with having disobeyed was mailed Aug. 11, 1942 (T. 60), and

requested that defendant report Aug. 24, 1942. The defendant was interviewed by the agent for the Federal Bureau of Investigation about Sept. 22, 1942 (T. 64). The crime, alleged to have been committed, did not, therefore, occur before Aug. 24, 1942 and could not have been the subject of investigation during the January term of said District Court. The investigation of defendant's alleged crime necessarily arose after the June term had commenced. No valid order authorizing this jury to continue to sit after the January term could be made as to defendant's alleged crime. Each separate offender, in absence of a charge of conspiracy involves and requires a separate investigation within the meaning of 28 U. S. C. A., Sec. 421, *supra*.

In *Harlan vs. McGourin*, 218 U. S. 442, 31 S. C. 44, the case of *Ex parte Harlan*, 180 Fed. 119, 132, was affirmed. The lower court stated that where terms of court are created to commence at different places within a district where there is only one judge, a legislative intent is evinced to interrupt the sittings of the court for each place named by the commencement of a new term at the new place. This court will take judicial notice that there is only one District Judge for the Eastern District of Wisconsin. The legislature must have intended to interrupt the January term at Milwaukee when requiring the district judge to commence the April term in Green Bay and the June term in Oshkosh. Each term of Court is for the entire district, by 28 U. S. C. A., Sec. 195, *supra*. A term of court for the Eastern District of Wisconsin necessarily cannot commence on the first Tuesday in April, or on the second Tuesday in June, without terminating the preceding terms, the January and April terms, respectively.

In *U. S. vs. Johnson*, decided by this Court June 7, 1943, 63 S. C. 1233, 1235, it is said:

> "Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance."

At page 1237 the Court states that the grand jury

> "is not forbidden to inquire into new matters within the general scope of its inquiry but only into a truly new, in the sense of dissociated, subject-matter."

The subject matter of petitioner's infractions of the law, if any, must necessarily be dissociated from the investigation of infractions by other defendants where no conspiracy is charged. If this were not true, the provision of the statute would be meaningless since a grand jury of course is empowered and called to inquire into all crime committed within its jurisdiction. Where the crimes are totally disconnected, the investigation of each must necessarily be dissociated. The investigation of petitioner's case was necessarily commenced after the power of the Grand Jury to commence new investigations had expired. The indictment, therefore, is without legal authority and the proceedings below based thereon should be reversed.

B. The decision of the Circuit Court of Appeals decides an important question of general law in conflict with the weight of authority.

9. *So-called order signed by one member, without action or vote of the Board, is illegal and indictment and subsequent proceedings below founded thereon are void.*

The Selective Training and Service Act of 1940 provides at Sec. 10 that the President is authorized to create a Selective Service System and establish within it civilian Local Boards, and other civilian agencies. The Act provides:

> "No member of any such Local Board shall be a member of the land or naval forces of the United States, but each member of any such Local Board shall be a civilian who is a citizen of the United States, residing in the county or political subdivision corresponding thereto in which such Local Board has jurisdiction. * * * Such Local Boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the Appeal Boards herein authorized, all questions or claims with respect to for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such Local Boards. The decision of such Local Boards shall be final, except where an appeal is authorized * * *."

By Sec. 10 (a) (3) the President was authorized to appoint a Director of Selective Service, and such other officers and employees as he may deem necessary, provided

that any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve thereof may be assigned or detailed to any office to carry out the provisions of the Act, except as to offices or positions on local boards, appeal boards, or agencies of appeal established pursuant to Sec. 10 (a) (2) referred to above. The decisions then, which the law provides, shall be final (see opinions below in this and Mroz cases) are those of the civilian local boards.

The regulations, at Sec. 603.56, provide for meetings of the local boards and that every member shall vote on every question. The so-called order to report recites "Having submitted yourself to a local board composed of your neighbors * * * you have been assigned to work of national importance under civilian direction." (T. 13). The implication is that the assignment of defendant was made by his local board. The evidence is to the contrary. The clerk of the board testified that

> "When Mr. Davlin signed this order no other members of the Board were present. * * * No votes are ever taken by the Board as to the issuance of this order to report. (T. 61) * * * The order to report was not directed to be issued by any person by our Board as a result of any meeting held by the Board. That is clerical procedure. We just have a member sign it. * * * The order to work was issued on the basis of General Hershey's letter. * * * The order to report for work was issued by our Board because of an order received from some person in higher authority. We wait for instructions from Madison. We issued the order in response to the language: (T. 73)
>
> "'The above registrant, having been reported to national Headquarters as being in Class IV-E, and with his order number reached, is assigned to Merom Camp, Merom, Indiana, and is to be ordered to report for work of national importance on August 24, 1942, by you.'
>
> "By 'you' is meant Local Draft Board No. 2. After receipt of the letters we sent this Form 50, order to report for work."

It appears clearly from the record that the order in question was not that of the local board, but that of the National Director of Selective Service given over the signature of a member of the local board. Proofs, therefore, (See T. 98)

fail to support the indictment which stated that defendant's crime was the failure to perform a duty, i.e., to carry out "a direction or order issued by Local Board No. 2 of Milwaukee, Milwaukee County, Wisconsin, for him, the said Walter Ford Gormly, to report * * *." (T. 2)

At Sec. 603.54 the local board is given full authority to do and perform all acts authorized by the Selective Service law.

By Sec. 603.1 the Director of Selective Service has his duties prescribed for him, and at no point is he given authority to make orders directly to registrants. His powers relate to administrative matters and not to those matters relating to the direct dealing between local board and registrant, required by the Act to be under civilian direction.

Sec. 652.2 of the regulations provides that the Director may assign conscientious objectors to camp. As shown by defendant's exhibit H, the Director, in turn, has delegated to the National Service Board for Religious Objectors the duty of making assignments, subject to his approval. This is an assumption of power by the Director not contemplated by the Act.

Sec. 627.1 gives the National Director power to appeal from determinations of local boards and appeal boards. This puts him in an adversary position, inconsistent with any power to issue orders to local boards in matters of selection and induction.

By Sec. 632.3 the local board selects the men who shall be inducted. An assignment made by the Director is accordingly an assumption of authority not his. The assignments of defendant to report to the Camp at Merom, Indiana, first on July 21, 1942, and later on August 24, 1942, were ineffective until adopted, ratified, and approved by the Local Board, which action was never taken, except by the unauthorized act of the Secretary as a member of the Board.

The Court below, by reading Sec. 652.1, 652.2, and 652.11, concludes (p. 4): (T. 97)

> "that the order to report was not a discretionary order of the Local Board requiring the meeting of the Board and a *determination* of the Board to issue it. It was a notification practically of statutory stature, being the prescribed form of notice designated by the regulations to be issued upon *order* of the Director of

> Selective Service. When the Director so notifies the Board to act, *it must do so.* No meeting of the Board is necessary to pass upon the advisability of issuing the order to report or of the terms of the order."

The Court below thus approves regulations which depart from the statute, and permits the Director to issue orders which Congress said should be the subject of determination by civilian local boards. A regulation cannot be considered law or "of statutory stature" which departs from the plain terms of the statute. Furthermore, the regulations, at Sec. 652.11, are silent as to the issuance of the so-called order in question.

Sec. 652.11 provides that upon receipt of an assignment to work of national importance, Form 49, the local board shall prepare six copies of an order to report, Form 50, and mail the original to the registrant at least ten days before the date set for him to report. Nothing is said about the issuance of a direction or order, such as the indictment says was issued by local board No. 2 (T. 2). Neither the law nor the regulations provide for any action by the Local Board except mailing the original of a form labeled "Order to Report." The regulation does not say whose order it is since the National Director has only, under Sec. 652.2, made an assignment.

Petitioner raises the question whether he can be sentenced to jail for five years for failing to obey a so-called order which neither the law nor the regulations provide shall be made by any person in authority.

The Court below says the "order to report was not a discretionary order," but a ministerial act. A "ministerial act" consists in the discharge of some duty enjoined by law where no judgment or discretion is required. *Lechleidner vs. Carson*, 68 P. (2) 482, 848; 156 Or. 636. There was judgment and discretion required to be exercised by the board up to, including, and even beyond the issuance of the so-called order in determining whether at that time he should still be continued in Class IV-E. (Regulations, Sec. 626.1) (T. 47, 48)

A "ministerial act" is one which may be compelled by mandamus. *State ex rel. Millers Nat. Ins. Co. vs. Fumbanks*, 151 S. W. (2) 148, 150, 151; 177 Tenn. 455. I do not believe that this Court will consider that acts of Local Draft Boards can be compelled by mandamus, although perhaps the decision of June 9, 1943 in this case, if allowed

to stand, opens the door to such action. To be a "ministerial act" the law must prescribe the time, mode and occasion for the act with such certainty that nothing remains for the judgment. *Merlette vs. State,* 14 So. 562, 563; 100 Ala. 42. Yet, in this very case a similar direction was disregarded by the draft board. (T. 79, R. 110, Ex. L). (See letters dated June 20, 1942 and July 6, 1942, Ex. A (11) and (12), T. 71).

The local board exercised its discretion and did not issue the order to report because, as the Court points out, (T. 9 p. 2, instead of sending out Form 50, in accordance with the notice of June, 1942, "The local board carried on some correspondence as to whether the appellant had been assigned to the proper camp due to a question arising out of a change in residence." It will be noted that the regulation 652.11 provides for the mailing out of Form 50 (T. 9 upon receipt of an "assignment to work." The mailing out of a form is not making or issuance of an order, and the law does not prescribe when or how, or by whom such orders shall be issued or made.

The local board must pass on the fitness of the registrant by Sec. 622.61, and 622.62, and place in Class IV-F any person morally unfit, physically or mentally unfit for work of national importance. It has been held that determination of fitness is not a mere ministerial act, but involves the exercise of judgment. *Long vs. Somervell,* 22 N. Y. S. (2) 931, 936.

The difference between the issuance of an order and the entry thereof, the former discretionary and the latter ministerial, is pointed out in many cases collected in 27 Words and Phrases (Perm. Ed.), p. 252 seq. "Ministerial Act." *Allan vs. Miller,* (Neb.) 6, N. W. (2) 594, 598; *Application of Gleit,* 33 N. Y. S. (2) 629, 631. The filling out of a form is like the record of the judgment by a clerk, and is not the rendition of the order which is judicial. Signing the form might be ministerial if there were an order in fact.

Since the work is to be under civilian direction, Congress must have contemplated that the assignment, if any, be made by the civilian branch of the Selective Service System, namely the local draft board. In making the assignment the board would necessarily have to determine: 1. whether a new assignment should be made if the work

the registrant was then doing was work of national importance; 2. if not, what work was then available in the locality; 3. which of such work, if any, the registrant was qualified to do; and 4. whether he was willing.

The proper determination of these facts would require a hearing and the present lack of hearing shows lack of due process in the case before the court.

> MORGAN vs. U. S., 298 U. S. 468, 480; 56 S. C. 906; 80 L. Ed. 1288.

If the registrant is unwilling to accept the assignment to work of national importance the Act is silent as to the next step. Power to assign does not include power to order or compel acceptance of the assignment. Such construction would render the provision unconstitutional. We do not find any definition of the word "assign" in Words & Phrases, (perm. ed.), or 1943 pocket part, fitting the sense in which the word is or may be used in the Selective Training and Service Act of 1940.

In Webster's International Dictionary (2nd ed., unabridged) the transitive verb "assign" is defined, among other meanings, as "to appoint or consign (one) to a post or duty; also, to prescribe, as a course of *action* or a task" quoting 2 Sam. XI:16. Whether the word connotes power to enforce depends upon surrounding circumstances. Since Congress is dealing with civilian direction and not military power, and any other meaning would be in derogation of natural rights, the necessary connotation is mere assignment and reassignment until some voluntary basis or arrangement is worked out agreeable to the citizen concerned.

It is good general law that an administrative body, such as is the local board, cannot exceed its statutory powers and must administer the laws made by the legislature, Congress.

> *State ex rel. Madison Airport Co. vs. Wrabetz,* 231 Wis. 147, 153.
>
> MONTELLO GRANITE CO. vs. INDUSTRIAL COMMISSION, 197 Wis. 428, 431.

10. Alleged order is void because it violates petitioner's rights under the First Amendment.

Amendment I to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The alleged order (T. 13) it is claimed required petitioner to report so that he might be transported to Merom Camp at Merom, Indiana. The management of this camp is under the direction of approved representatives of the National Service Board for Religious Objectors. (T. 69) Selective Service Regulations, Part 691, is to the same effect. As quoted from proffered exhibit H earlier herein, the Board operates through administrative agencies which will be recognized as representing four religious denominations, to-wit: 1, The Friends or Quakers; 2, the Catholic Church; 3, the United Brethren; and 4, the Mennonites. As said excluded exhibit shows, Camp Merom is administered by the American Friends Service Committee. Petitioner does not belong to the Friends, but to a different religious organization—the Methodist Church. Did Congress intend to authorize the President to assign a Jew to a camp conducted by the Catholic agency, or an Episcopalian to a Mennonite camp? The regulations have brought a voluntary religious organization, representing four religious denominations, without any authority in the Act.

In Cooley's Constitutional limitations (Third Edition), (p. 467), it is said:

> "Whoever shall examine with care the American constitution will find nothing more fully stated or more plainly expressed than the desire of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of inequality in the civil or political rights of citizens, based upon differences of religious belief."

* * * (p. 469)

> "The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects.

In Cooley's Principles of Constitutional Law (Third Edition) it is said, (p. 224):

> "By establishment of religion is meant * * * the conferring upon one church of special favors and advantages which are denied to others."

Being a religious organization representing a few denominations in charge of all conscientious objectors' camps

throughout the country is a preference for the sects represented contrary to the policy of our government and this court should disapprove of administrative adoption of any such policy where not authorized by law. At this point we quote also from Cooley's Constitutional Limitations, (p. 477, 478):

> "Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. Even in the important matter of bearing arms for the public defense, those who cannot in conscience take part are excused, and their proportion of this great and sometimes imperative burden is borne by the rest of the community."

It is regrettable that the *Arver case* discarded this important American principle and acted upon legislative precedents alleged to be current in Great Britain, Germany, Italy, Japan and other countries, many of whom do not share our form of government or free way of life. The last quotation, however, supports our claim that petitioner cannot be compelled to accept assignment to a camp conducted by a voluntary organization with limited or special denominational religious ties. The *Arver case* does not control the law or facts in this case. The present law is very different. Powers of government cannot be delegated to voluntary associations, such as the National Service Board for Religious Objectors.

SCHECHTER POULTRY CORP. vs. U. S., 295 U. S. 495, 537; 55 S. C. 837, 846.

11. *Defendant did not receive due process and a fair trial, required by the Constitution and the law of the land.*

a. *Jury not a fair sample.*

Among 22 jurors drawn by lot from the panel to try defendant, five were retired employees of the United States Post Office Department. Defendant moved for new trial on this ground, motion was denied and exception taken. (T. 90)

b. *The Court was prejudiced.*

The Court was prejudiced against defendant because he

is a conscientious objector, as shown by the statement (T. 91):

> "Nevertheless, if that right, that you exercise to determine for yourself what is and what is not combatant or noncombatant military or non-military service, were exercised by every American citizen, then there would be no freedom of right to exercise anything in this country or anywhere else in the world."

The Circuit Court of Appeals also was prejudiced against conscientious objectors, and such prejudice is shown in the opinions of the court in this case and in the *Mroz* case quoted above. The Court below, in its Mroz opinion (p. 6), speculates as follows: (p. 24 supra)

> "His challenge, if successful, would jeopardize the country's defense in time of war. *That may have been defendant's object*, or his action may have resulted from an over exaltation of self and minimization of the obligation of a citizen to society. Whatever his mental reaction to a war status may have been, the result is the same." (Emphasis ours)

This intimation of intent bordering on treason does not comport well with Congressional intent.

Because of the action of defendant Mroz anticipating his test of the draft board's action, by legal proceedings, the court said, (p. 7) (p. 25 supra)

> "He cannot 'take the law into his own hands' * * *."

The Court is oblivious to the stature of an individual citizen and the fact that his rights are not suspended by fortuitous emergencies, however important, the court saying, (p. 8): (p. 25, supra)

> "Appellant dwells on lack of a due process hearing, and on arbitrary and capricious action. He seemingly fails to realize that war is realistic, that the emergency requires immediate mobilization of a large manpower; that each case must be handled individually yet speedily."

The acid statement in the Mroz opinion, (p. 9) to the effect that the local board placed the defendent Mroz "in a category where his valued life is safer than that of many of his fellow citizens," reflects a prejudice against conscientious objectors, and raises a doubt as to whether the contentions as to the validity of the order of the board received rational consideration by the Court. (p. 26 supra)

The Court imputes the defendant's position to his counsel, although the record will show counsel was changed between time of trial and time of appeal. (pp. 3, 9) (pp. 22, 26 supra)

The same prejudice is shown in the Gormly opinion below (p. 5): (T. 48)

> "And finally no doubt, he was possibly prompted by the belief that his conscientious objector's plea had secured for him avoidance of military duty, and stubborn reliance on this objection to a citizen's duty might obtain for him complete immunity from all such citizen's obligations."

Apparently, judging from this speculation not based on the record, the Court is not in accord with Congressional intent. (T. 100)

Again, (p. 7) the Court below castigates defendant as a "citizen who refuses to obey the command of his Government." In the Gormly opinion below no cases are cited by the Court as precedents.

c. *Evidence objected to was improperly received.*

Defendant objected to the receipt in evidence of a statement taken by the F. B. I., and this statement, received over objection, was read at length to the jury. (T. 64)

d. *Court refused to require production of evidence in possession of the government.*

The defendant requested that a certain record in the possession of the local board be produced at the trial. The Court declined to require its production although it was in possession of the local board. (T. 71) This refusal violated the constitutional provision, Amendment Six of the United States Constitution, that the defendant shall enjoy the right "to be confronted with the witnesses against him," and "to have compulsory process for obtaining witnesses in his favor." The witness admitted that the subpoena required the production of all records of the draft board. (T. 61)

e. *Court permitted improper cross examination of defendant.*

Defendant was put upon the stand to testify with respect to certain papers relating to the case which the police had taken from him and had not returned. (T. 63, 81, 82) Over objection the Court permitted the government

to inquire as to the contents of the papers which was beyond the scope of the direct examination.

f. *Court conducted parts of the trial out of the presence of defendant.*

Court required counsel for defendant, when offering exhibits or attempting to elicit testimony which the Court considered might be objectionable, to retire from the court room with the court reporter. The defendant was excluded from or not present at such portions of the trial conducted in chambers. (T. 66, 68, 76) Such practice violates the rule that the defendant is to be present during the whole course of his trial.

g. *Court improperly excluded proffered evidence and testimony.*

As bearing on the question of work of national importance, the Court excluded testimony that the work done in Civilian Public Service camps is substantially the same as that done in Civilian Conservation Corps. (T. 68)

The Court also excluded the offer of defendant's Ex. B, regulations of the War Department, to show rates of pay allowed members of the Civilian Conservation Corps. (T. 68)

The Court excluded defendant's proffered Ex. D, being official publication of the Forest Service, to show that work in the Civilian Conservation Corps was terminated, this bearing on the allegation of the indictment (T. 2) and proof that defendant was to be transported to Camp Merom (T. 13) for "work of national importance." (T. 69)

The Court required counsel for defendant to offer exhibits outside the presence of the witness, expected to identify them, and erroneously refused to receive defendant's Ex. H, being an official bulletin of the National Service Board for Religious Objectors, the agency mentioned in Ex. C, received in evidence, and Part 691 of the official regulations. Said Ex. H contains important facts and information bearing upon defendant's case. (T. 76)

The Court erroneously refused to receive defendant's proffered Ex. I, being a publication of the administrative agencies representing National Service Board for Religious Objectors, in which it is stated that the conscientious objector is assigned to camp "for the duration," and "receives no pay for his work." (T. 77)

The Court erroneously refused to receive defendant's proffered Ex. J, being a bulletin published by one of the administrative agencies representing the National Service Board for Religious Objectors, in which the aims and objectives of Civilian Public Service Camps are set forth. The exhibit shows such wide departures from the congressional aim of "work of national importance," as that the aims of Civilian Public Service Camps are "development of attitudes necessary to world reconciliation"; "promotion of health * * * as the physical basis of the more abundant life," and "defense of the spiritual values of democracy and of personal freedom under the laws of God and the state." (T. 77, 78)

The Court erroneously excluded defendant's Ex. L, which was an official communication to him from the Civilian Public Service camp to which he had been assigned (T. 79, 82), and defendant's Ex. M, which was a letter from the same camp containing information bearing upon defendant's defenses in this case. (T. 80, 82)

g. *Improper argument to the jury defeated fair trial.*

The Court did not stop or caution counsel for the government, and the Assistant United States Attorney in arguing to the jury used inflammatory language not necessary to the decisions of the case. Such argument deprived defendant of a fair trial. The District Attorney argued that the defendant set himself up above the law (T. 84), and said:

> "He invokes all the rights, but he refused to perform the duty placed upon him by that law. He is sufficient unto himself. No matter what the other millions of people in the country might say or feel, he is going to determine for himself whether or not he should obey this law." (T. 84, 85)

The District Attorney, although aware that evidence bearing upon the question as to whether work in Civilian Public Service Camps is of national importance, had been excluded on his objection, argued to the jury, that defendant's failure "to report for work of national importance at a camp of a civilian nature where he would do work for his fellow citizens which was absolutely non-military, while other men his age were fighting and dying on the battlefields of the world in this present war." (T. 85) should convict him.

The District Attorney argued that defendant's action would result in anarchy, and in rebuttal that the fact that defendant reported to the District Attorney on Aug. 24, 1942, "was just an additional exhibition of his defiance of the law." (T. 88) Such argument was not germane to the issues and was intended to arouse prejudice against defendant.

h. *The Court improperly narrowed issues of indictment.*

The Court said: (T. 81)

> "the issues in this case are two: Whether or not Defendant received a notice to report, and whether or not he did report. Those are the only two issues for the jury to determine in this case."

In the instructions he amplified the issues to three: One, was defendant properly ordered to appear, (2) did he receive such an order, and (3) did he fail to report? (T. 38) The Court thus took from the jury all questions of fact involved in the indictment as to whether the work at Camp Merom was of national importance and under civilian direction.

i. *The Court improperly expropriated the function of the jury.*

The Court, having stated that the question as to whether the defendant was properly ordered to appear was a question for the jury, anticipated the jury's answer and substituted Court action for jury action by instructing the jury on this issue: (T. 37)

> "Accordingly, *this Defendant was*, subsequently to the consideration of his questionnaire and his classification as IV-E, ordered assigned to such a camp and *ordered to report* for service at such a Public Service Camp." (Emphasis ours)

The Court further instructed the jury: (T. 37)

> "When an order of the Local Draft Board becomes final and is validly made, it is no defense for the registrant to whom the order was issued, in wilfully failing to obey that order, that he does so by reason of religious beliefs."

Thus, supplanting the jury as to whether the order was validly made, by implying that the order in question was final, the Court instructed the jury that defendant's

conscientious objections to performance of the supposed order could not be considered by the jury. Due process required that the issues of fact be submitted to the jury without any attempt by the court to prejudice them.

KONDA vs. U. S., C. C. A. 7, 166 F. 91, 93.

The Court there said:

> "Our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting."

C. Decision of the Circuit Court of Appeals is at variance with decisions in other circuits.

12. Ruling that an order of a local board may not be questioned or inquired into as to its validity is not good law.

The Court below, in a manner, indicated that it was a jury question whether the defendant was properly ordered to appear (T. 38), and that when the order of a local draft board becomes final *and is validly made*, it must be obeyed. While the court thus indicates that some inquiry may be made into the validity of the order, the effect of the rulings, and the instructions was to deny such inquiry. In the dissenting opinion of Justice Jackson in *Bowles vs. U. S.*, decided by this Court May 3, 1943, it is said:

> "The Court does not consider whether one may be convicted for disobeying an invalid order; * * *. But I would not readily assume that, whatever may be the other consequences of refusal to report for induction, courts must convict and punish one for disobedience of an unlawful order by whomsoever made."

As this point was not ruled upon by the majority, we trust that this expression is the majority rule since it is the general rule.

The court below, in its opinion, says (p. 5):

> "The essential requirements are that a direction be given by the Director of Selective Service and that defendant be informed that an order assigning him to a camp has been made. Both of these requirements were conclusively shown to exist in this case. They

were not questioned by defendant until his counsel asserted their necessity."

Of course, counsel should be expected to assert defenses, and defendant, before being represented by counsel, would hardly be expected to anticipate the defenses to be later asserted by his counsel. In this case and the *Mroz case,* it is not clear whether the Court below would in all cases support an invalid order or classification.

The court says, referring to the classification of the local board, (p. 7) :(part of Mroz opinion omitted at top of p. 25 supra)

"The statute makes such decision final. It follows that he was not entitled, in this criminal case, to attack that finding,"

citing *Bowles vs. U. S.*, U. S. Supreme Court, May 3, 1943. The citation does not support the proposition.

The court also says (p. 7) : (p. 25 supra)

"Appellant's clear and unqualified duty was to comply with his draft board's order."

This statement is not qualified to distinguish between an invalid and a valid order, although the court, on (p. 8) says: (p. 25 supra)

"Appellant dwells on lack of due process hearing, and on arbitrary and capricious action."

The court does not say what, in its opinion, would be the effect of lack of due process or arbitrary action. The court, at footnote 7, (p. 25 supra) cites and emphasizes quotations from cases in the second and third circuits to the effect that a registrant is bound to obey orders of his local board. Yet, as we now show, some of these cases stand for the proposition that the court will not enforce an invalid order.

The following cases in other circuits we believe hold that an invalid order, made without jurisdiction, or beyond the powers of the board, would be a defense to criminal prosecution.

In *Seele vs. U. S.*, 8 Cir., 133 F. (2d) 1015, it was stated that where the decision of the Director is final, it is not subject to review "at least unless the decision is wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious."

In *U. S. vs. Grieme*, 3 Cir., 128 F. (2d) 811, the Court stated that courts uniformly hold findings of draft boards final *unless full and fair hearing is not afforded, or the*

draft board acts contrary to law, or abuses discretion given by statute.

In *Rase vs. U. S.*, 6 Cir., 129 F. (2d) 204, it is stated that the only question of fact was whether the draft board accorded a fair and impartial hearing, and whether its decision was based upon evidence or was arbitrary and capricious. It was held there was no error in failing to submit other questions to the jury.

In *Johnson vs. U. S.*, 8 Cir., 126 F. (2) 242, it was held that no draft board can bind a defendant by an arbitrary classification against all substantial information, and that classifications must be honestly made and not arbitrarily. The court said (p. 247):

> "Courts can prevent arbitrary action of such agencies from being effective. But a registrant cannot come to a court for such relief until he has exhausted all available and sufficient administrative remedies for such arbitrary action."

Petitioner here has exhausted all administrative remedies, since the issues here do not concern his classification, and the regulations do not provide for any appeals by registrants, except as to questions of classification. (Reg. Sec. 627.2)

In *Checinski vs. U. S.*, 6 Cir., 129 F. (2) 461, the Court held that board records might be reviewed, and in the absence of proof of any failure by the board to consider evidence presented, or to give a fair hearing, the registrant would be without power to review his classification.

The language of these cases, if not the results, indicates that when there is presented to them cases in which an invalid local board order appears, such invalidity will be given effect whether due to failure to consider uncontroverted evidence submitted, unfair investigation, result clearly contrary to law, or other arbitrary or capricious action amounting to lack of due process. The action of the trial court, affirmed below, appears, therefore, to be in conflict with the law, as announced in these other circuits.

Because of this apparent conflict between the seventh and the third, sixth and eighth circuits, as well as on the other grounds herein set forth we urge the Court to issue a writ of certiorari in this case.

CONCLUSION

The court below, in *U. S. vs. Mroz*, quoted herein, says, (p. 9 of opinion): (p. 26 supra)

> "It is hard to conceive of any government at war dealing more considerately with its citizens who express conscientious objections to war than does the government of the United States of America."

The fact is that the government of Great Britain deals more considerately. From literature which we have examined, such as "Memorandum on the National Service Acts," 1939-1941, obtainable from H. M. Stationery Office, York House, Kingsway, W. C. (2), and "The Conscientious Objector and the National Service Acts," published by the Central Board for Conscientious Objectors, 6 Endsleigh Street, London W. C. 1, England, and other publications, it appears that the National Service Acts contemplate that conscientious objectors in England may be exempted from military service without any conditions. We are informed that as of July, 1942, over 2,500, or about 5% of those who were examined by the Local Tribunals, were given unconditional exemption. It appears fines ordinarily amount to £5, but in summary convictions by the court the fine may be up to £50, or imprisonment not exceeding 12 months, and on indictment, up to £100 or imprisonment for two years. In the United States, the fine may be $10,000 and jail up to five years. It appears also that registrants in England may appear by attorney, or other representatives. They are entitled to hearing *de novo* on appeal. Their expenses in attending hearings and trials and expenses of their witnesses are advanced to or reimbursed to them under the Acts. Work camps have not been established in England, and persons who have been exempted on condition that they do work of national importance many of them have remained at the work which they were then doing. They are not denied the fruit of their labor. "The Reporter" for May 1, 1943, Vol. 1, No. 16, published by the National Service Board for Religious Objectors has an article on "British C. O.'s," in which the author, William Eves, Chairman of the Foreign Service Section of the American Friends Service Committee, says:

> "It would appear that there is greater objection in England to conscription as a system. Very few have refused to register for the draft in America

even though absolute exemption is not possible. Regimentation would seem to be more objectionable to the English sense of freedom than in America."

This Court is the last line of defense for individual freedom in this country. We pray the Court to protect petitioner and those principles which differentiate Americans from the abject subjects of other systems of government.

In the Harvard Alumni Bulletin for April 24, 1943, pp. 496, 499 is a graphic description of the "Tenaru River Fight." Major John Howland, a lawyer, there states that of the Japanese "Jungle Regiment" of 1500 men, 1300 were killed, 35 wounded captured, and 130 took to the jungle where they died. The Marine Major's battalion had 24 killed and about 70 wounded. From this night battle of "Hell Point" he concludes:

> The annihilation of a unit of this calibre gave our men sureness and confidence. It showed us the enemy's limitations. The inexcusable loss of a unit like this was caused by the Japanese following orders blindly and mechanically. And our success was due largely to the capacity of the average American to fight intelligently on his own initiative without having to be told what to do. In this difference between types of fighting men, lies one of our great assets in the Pacific war.
>
> JOHN HOWLAND, '32, LL.B. '36
> Major, U. S. M. C.

In "Some Facts and Factors in the Japan of Today and Tomorrow," by Horace H. Underwood, President of Chosen Christian College in Korea, published in the Delta Upsilon Quarterly for July, 1943, (p. 182, at p. 184), the author says:

> "Like all Oriental peoples, the Japanese holds human life very cheap, his own as well as others. He is calloused to human suffering and for the nth time we remind you he is blindly obedient, ready to execute without thought or compunction any orders he may receive. He is also completely self-centered."

The Selective Service regulations provide that every form set up thereunder shall be a part thereof (Reg. Sec. 605.51), and regulations and forms are replete with directions and orders. If the failure to observe, answer and

obey all of these multifarious instructions, rules and orders is in every case to constitute a crime at the election of the System, punishable by the courts, the America of the future may be reduced to that abject state of blind obedience characteristic of Japan and other people accustomed to taking dictation from a government not responsible to them.

For the reasons herein given we pray the court to take jurisdiction, issue its writ of certiorari, and upon hearing on the merits reverse the judgment below.

Respectfully submitted,

PERRY J. STEARNS,
Attorney for Defendant.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 220

WALTER FORD GORMLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94–100)[1] is reported at 136 F. (2d) 227.

JURISDICTION

The judgment of the circuit court of appeals was entered June 9, 1943 (R. 101), and a petition for rehearing was denied July 2, 1943 (R. 101–102). The petition for a writ of certiorari was

[1] The record is in two volumes consecutively paginated but separately entitled, respectively, "Transcript of Record" and "Bill of Exceptions." Both are designated herein as Record (R.).

filed August 2, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment was returned before the close of the term of court for which the grand jury returning it had been convened.

2. Whether section 5 (g) of the Selective Training and Service Act of 1940, and the Selective Service Regulations issued thereunder, requiring assignment of conscientious objectors to work of national importance under civilian direction, are valid.

3. Whether petitioner knowingly violated a valid order of his draft board to report for assignment.

4. Whether petitioner was deprived of a fair trial by the inclusion of former postal employees on the jury panel, by the conduct of the trial judge or the prosecutor, by rulings on the admission and exclusion of evidence, or by the charge to the jury.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 23–29.

STATEMENT

On October 1, 1940, in a one-count indictment filed in the District Court of the United States for

the Eastern District of Wisconsin, petitioner was charged with having "knowingly, wilfully and unlawfully" disobeyed an order of Local Board No. 2 of Milwaukee, Wisconsin, that he, as a conscientious objector to noncombatant as well as combatant military service, report to the Board on August 24, 1942, for work of national importance (R. 2).[2] He was found guilty by a jury (R. 22, 88) and was sentenced, after rejecting the court's offer to permit him to obey the Board's order in lieu of sentence, to five years' imprisonment (R. 90–91). Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the conviction was unanimously affirmed (R. 94–101).

Petitioner is 28 years of age and holds a degree in Mechanical Engineering from Iowa State College (R. 64, 81–82). His conscientious objection to military service is not based on any tenets of the Methodist Church, of which he is a member (R. 65, 82), but rather on philosophical readings (R. 64). He registered with the local board on October 16, 1940, stating on his questionnaire that he was opposed to noncombatant as well as com-

[2] Petitioner's motion for a bill of particulars (R. 9–11) was granted in part (R. 11–15). His motions for particulars as to the grand jury proceedings and to inspect the grand jury minutes (R. 3–8), his demurrer and motion to quash the indictment (R. 17–20), and his plea in abatement (R. 22–27) and in bar (R. 27–29), were denied (R. 4–5, 8, 21), as were his subsequent motions to dismiss, for a directed verdict, new trial, judgment notwithstanding the verdict, and in arrest of judgment (R. 21–22, 66, 83, 89–90).

batant military service (R. 60, 64). He was placed originally, on August 27, 1941, in Class IV–E–L.S. (limited service) (R. 60).[3] At a subsequent meeting of the board on March 28, 1942, he was reclassified by vote of the board into Class IV–E,[4] (R. 60–62). By virtue of such classification he was thereafter assigned by the Director of Selective Service (R. 71–73) to the Merom Camp, a Civilian Public Service Camp established to carry on work of national importance under civilian direction (R. 68–69). Pursuant to an order received from General Hershey (R. 73), the local board on August 11, 1942, issued and sent to petitioner by mail an order, signed by Louis Davlin, a member who was also the secretary (R. 61), directing petitioner to report at the board's headquarters at 10 A. M. on August 24, 1942, for transportation to the Merom Camp (R. 13, 60, 72). Petitioner received the order (R. 63, 65, 82). He testified that at 10 A. M. on August 24, 1942, he reported to the United States District Attorney's office and told an Assistant District Attorney that he was sup-

[3] This classification was later discontinued. *Selective Service Regulation* 622.52.

[4] This is the classification provided for conscientious objectors to noncombatant as well as combatant military service who have no basis for exemption or deferment and who would, therefore, be placed in Class I–A were it not for their convictions based on religious training and belief. *Selective Service Regulation* 622.51.

posed to report to the board but was reporting to the District Attorney's office instead (R. 83). Petitioner did not at any time report to the board in compliance with its order (R. 60–61, 63, 83), and upon a delinquency notice being sent him (R. 60, 82), he wrote the board saying that he would not go to a Civilian Public Service Camp "because in accepting conscription into such a camp I participate in one of the activities of the war machine, and thus become an accessory to murder on the battlefield" (R. 65).

ARGUMENT

I

Petitioner's contention (Pet. 38–40) that both the return of the indictment and the facts constituting the offense charged therein occurred after the close of the term of court for which the grand jury returning it had been convened, was rejected by the circuit court of appeals (R. 96) on the basis of its decision of an identical issue in *Mroz* v. *United States,* 136 F. (2d) 221, 224, in which a petition for certiorari, No. 239, this Term, was filed in this Court on August 6, 1943, but which was withdrawn on September 1, 1943, upon stipulation of the parties.

Terms of Court for the District Court of the United States for the Eastern District of Wisconsin are fixed by statute (28 U. S. C. 195) to commence at Milwaukee on the first Mondays of January and October, at Green Bay on the first

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Tuesday in April, and at Oshkosh on the second Tuesday in June. No termination dates are fixed by statute or by court rule.[5] The grand jury indicting petitioner was convened for the regular term beginning at Milwaukee in January 1942, and returned the indictment on October 1, 1942 (R. 2), which fell on Thursday, prior to the commencement of the October Term. Petitioner does not contend that the January Term was ever adjourned *sine die*. But it is well settled that in the absence of a fixed termination date, a term of court commenced at the time and place provided by statute continues until it is adjourned *sine die* or until the next term at that place commences.[6] This rule applies although another term has commenced at another place in the same district.[7]

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[5] Rule 6 of the Rules of the United States District Court for the Eastern District of Wisconsin provides: "Each Monday at 10:00 a. m. (except during the month of August), at the Court Room in the city of Milwaukee, Wisconsin, is designated as motion day. All motions in causes, civil, criminal, in admiralty, or in bankruptcy, which require notice and hearing, will be disposed of at such times. * * *" This rule clearly presupposes that the January term at Milwaukee survives the commencement of the April and June terms at Green Bay and Oshkosh, respectively.

[6] *Harlan* v. *McGourin*, 218 U. S. 442, 450; *United States* v. *Rasmussen*, 95 F. (2d) 842, 843 (C. C. A. 10); *East Tennessee Iron & Coal Co.* v. *Wiggin*, 68 Fed. 446, 447 (C. C. A. 6); *United States* v. *Perlstein*, 39 F. Supp. 965, 968 (D. N. J.), affirmed, 126 F. (2d) 789 (C. C. A. 3), certiorari denied, 316 U. S. 678.

[7] *Harlan* v. *McGourin*, *supra*, n. 6. That there may be concurrent grand juries at different places within a single

Since the absence of the judge does not operate to end a term of court properly commenced,[8] and since judges from other districts may be specially assigned (28 U. S. C. 17), it cannot successfully be contended that by providing for several terms of court at different places in a district to which only one judge is regularly assigned, Congress "must have intended" (Pet. 39) that each term should end upon the commencement of a term at another place in the same district.[9] We submit,

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judicial district during different terms seems clear. 28 U. S. C. 421; *United States* v. *Perlstein*, *supra*, n. 6; cf. *Borgia* v. *United States*, 78 F. (2d) 550, 552–553 (C. C. A. 9).

[8] *Harlan* v. *McGourin*, *supra*, n. 6; *Commonwealth* v. *Bannon*, 97 Mass. 214, 219 (1867); *In re Estate of Hunter*, 84 Ia. 388, 391–392 (1892).

[9] Petitioner cites the lower court in *Ex parte Harlan*, 180 Fed. 119, 132 (C. C. N. D. Fla.), affirmed in *Harlan* v. *McGourin*, *supra*, n. 6, as having stated that where terms of court are created to commence at different places within a district where there is only one judge, a legislative intent is evinced to interrupt the sittings of the court for each place named by the commencement of a new term at the new place (Pet. 39). What the lower court actually said is as follows (pp. 132–133):

"Section 658 of the Revised Statutes * * * provides that the regular term of the Circuit Courts for the Northern District of Florida shall be held in each year at Tallahassee on the first Monday in February, and at Pensacola on the first Monday in March. * * * the plain command of the statute is that the Circuit Court must commence to sit at Pensacola on the first Monday in March of each year, and have the succeeding 12 months in which to sit for the dispatch of business; * * * This full 12 months, in which this court may dispatch its business, is contemplated here, notwithstanding the requirement of the regular session at

therefore, that the indictment in the present case was not returned out of time.

II

Petitioner's contentions addressed to the constitutionality of Section 5 (g) of the Selective Training and Service Act and of the Regulations issued thereunder are without merit.[10] Military service may be required regardless of personal feelings or religious beliefs, and does not constitute involuntary servitude or slavery.[11] An exemption therefrom is the result of Congressional discretion rather than of constitutional mandate.[12] Petitioner apparently concedes as much, but contends that these principles, being founded on the

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Tallahassee each year. There are five judges who may sit in the Circuit Court aside from those who may be specially designated * * *. The requirement to hold the Circuit Court at Tallahassee does not, therefore, evince any legislative intention to interrupt the sittings of the court at Pensacola during the regular March term."

[10] Our discussion in this part of the Argument is directed principally to petitioner's reliance on the First and Thirteenth Amendments, delegation of powers principles, and the "void for vagueness" rule (Pet. 28–37, 45–47). Space limitations forbid our dealing *seriatim* with all of the many contentions by petitioner, constitutional and otherwise, that the court below properly regarded as too trivial for mention (R. 99).

[11] *Selective Draft Law Cases*, 245 U. S. 366; *Jones* v. *Perkins*, 245 U. S. 390; *Angelus* v. *Sullivan*, 246 Fed. 54, 59–60 (C. C. A. 2); *United States* v. *Sugar*, 243 Fed. 423, 428 (E. D. Mich.); see *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29.

[12] *United States* v. *MacIntosh*, 283 U. S. 605, 622; *Rase* v. *United States*, 129 F. (2d) 204, 210 (C. C. A. 6); *Hamilton* v. *Regents*, 293 U. S. 245, 263–264.

power to raise armies, do not authorize the conscription of men for other than military service (Pet. 29). That a provision for assigning conscientious objectors to work of national importance under civilian direction is a necessary and proper adjunct, however, to the execution of the power to wage war and raise armies, is demonstrated by the nature of the problems faced by the nation while at war, both in 1917–1918 and at the present time.

The Selective Draft Act of 1917 exempted conscientious objectors only from combatant service,[13] and the army experienced serious difficulty in handling conscripts opposed to noncombatant service. The Furlough Law of March 16, 1918,[14] made it possible for conscientious objectors to be furloughed to engage in work under civilian direction. Theretofore, and even thereafter in the case of one failing to avail himself of a furlough, a conscientious objector refusing to perform noncombatant military service was subject to punishment by the military authorities.[15] The presence of such persons in the army presented a problem of discipline and morale.

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[13] Act of May 18, 1917, c. 15, sec. 4, 40 Stat. 76, 78–79 (50 U. S. C. App. 204).

[14] Act of March 16, 1918, c. 23, 40 Stat. 450.

[15] See *Statement Concerning the Treatment of Conscientious Objectors in the Army* (June 18, 1919), prepared and published by direction of the Secretary of War.

This experience of the first world war showed the propriety of making a different provision for registrants opposed by religious training and belief to noncombatant as well as to combatant military service. Relieving them entirely of any obligation to render any service would obviously not accord with the principle of equality upon which the Selective Training and Service Act of 1940 is based.[16] A solution was reached by providing for their compulsory assignment to work of national importance, under civilian direction.[17] As conscription of conscientious objectors for military service is within Congressional power, their assignment to work analogous to noncombatant service in the armed forces, but under civilian direction to avoid

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[16] 50 U. S. C. App. 301 (b), *infra*, p. 23.

[17] By virtue of the authority vested in him by the Act, the President authorized the Director of Selective Service to designate or establish work of national importance. Executive Order No. 8675 (Feb. 6, 1941), 6 Fed. Reg. 831–832. In turn the Director has so designated certain camp projects, including the one at Merom, Indiana, to which petitioner was assigned (Def. Ex. C; R. 68–69). These camps are managed, subject to the direction of the Director of Selective Service, by the National Service Board for Religious Objectors, a private organization representing various religious groups. The actual work project in each camp is under the direction of technical agencies such as the United States Departments of Agriculture and the Interior. Over-all authority and responsibility is in the Director of Selective Service, who has prescribed regulations for the operation and governance of the camps. 6 Fed. Reg. 2001–2003 (April 11, 1941); 32 C. F. R., 1941 Supp., 653.1–23.

offending their own consciences, is clearly within Congressional power. Congress has not, as petitioner contends (Pet. 30), annexed an unconstitutional condition to a privilege, but has provided for a draft of manpower for two different purposes: service in the armed forces, and work of national importance of a nonmilitary character. The line between the two is drawn in part on the basis of the individual registrant's usefulness. Congress has regarded men forty-five or over as less useful for the present in military than in nonmilitary service.[18] It has likewise so regarded conscientious objectors, whose mental attitude sufficiently impairs their military usefulness to render their induction into military service unnecessary in the nation's interest if another form of service can be found for them in lieu thereof. As he is of an age and physical capacity for military service, and not within an otherwise deferred classification,[19] petitioner is in no position to com-

[18] However, in requiring registration of men from forty-five to sixty-five (Act of Dec. 20, 1941, c. 602, sec. 1, 55 Stat. 844; 50 U. S. C., Supp. I, 302), Congress undoubtedly was preparing for a possible need for their services. Petitioner's arguments, if sound, cannot be limited in their application to conscientious objectors, but would mean that the reservoir of registered men forty-five or over may never be conscripted for other than military purposes.

[19] The record shows no claim for deferment made by petitioner. His attempt at the trial to show that he was already doing work of national importance was irrelevant, as the trial court correctly held by excluding the proffered testi-

plain that compulsory nonmilitary service has as yet been required, under the Selective Training and Service Act, only of his own class. That he would be in military service apart from the single circumstance of his being a conscientious objector, is a sufficient basis for his being treated differently from those allowed to remain in civilian life for other reasons. Also, having applied for and been granted the classification in which he finds himself, he is not entitled to complain of its disadvantages in comparison with the military service (see R. 70, 75).

Nothing in the Act or Regulations, or in the fact that religious organizations participate in the management of Civilian Public Service Camps, in any way supports petitioner's contention (Pet. 45–47) that their establishment and operation interfere with freedom of religion. On the contrary, reliance by the Director of Selective Service on various religious organizations for voluntary aid in the operation of these camps, under his direction, goes far to secure the free exercise of religious convictions that forbid participation in war. Petitioner, as a Methodist, cannot properly contend (Pet. 46) that the principles of other denominations are being forced upon him by virtue of the fact that his own denomination, which does

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mony (R. 74–75). Courts and juries cannot be substituted for the Selective Service organization in the granting of deferments, without paralyzing the effectiveness of the Act.

not officially sanction his attitude (R. 65), has not sought to be represented (if this be true) on the National Service Board for Religious Objectors.

Against the challenge of unconstitutional delegation of legislative power, both the Selective Draft Act of 1917 [20] and the present Act [21] have already been sustained. Delegation to the President as Commander in Chief has at least as strong a basis as the broad delegation to him of the power of laying an embargo on the export of arms, which was sustained (*United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 314–329) without reference to ordinary principles of delegation for the reason that the matter was one of foreign relations over which the President has an independent constitutional authority. Petitioner's contentions of unconstitutional delegation (Pet. 31–32) proceed upon a premise that Congress has not established a standard for determining what is "civilian direction" or "work of national import-

[20] *Selective Draft Law Cases*, 245 U. S. 366, 389; *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897, 901 (C. C. A. 2); *Angelus* v. *Sullivan*, 246 Fed. 54, 60 (C. C. A. 2); *Franke* v. *Murray*, 248 Fed. 865, 869 (C. C. A. 8); *United States* v. *Sugar*, 243 Fed. 423, 434 (E. D. Mich.). Section 4 of the 1917 Act (50 U. S. C. App. 204) provided that conscientious objectors "shall not be exempted from service in any capacity that the President shall declare to be noncombatant."

[21] *Seele* v. *United States*, 133 F. (2d) 1015, 1019–1020 (C. C. A. 8).

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ance." But "civilian direction" is obviously the antithesis of the "military direction" from which persons such as petitioner seek exemption. The requirement that they be assigned to "work of national importance" means that they, too, must contribute to the national well-being, but on a basis deemed not in conflict with their religious convictions. The Constitution does not require that Congress undertake the multitudinous burden of specifying all the kinds of work that are of national importance. Instead, the designation of work projects, such as the Merom Camp project to which petitioner was assigned, is appropriately left for administrative action. Matters of administrative detail, on which it is not reasonably practical for Congress to legislate, may clearly be left, within the framework of the primary standard established by Congress, to the discretion of the President and the Director of Selective Service.[22]

Petitioner's contention that the Act unconstitutionally delegates judicial powers to administrative agencies (Pet. 32–34) is equally devoid of merit,[23] as is his still further contention that the

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[22] *Currin* v. *Wallace*, 306 U. S. 1, 17; *Opp Cotton Mills, Inc.*, v. *Administrator*, 312 U. S. 126, 144; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 574; *United States* v. *Grimaud*, 220 U. S. 506, 516.

[23] This contention is founded on the erroneous premise that assignment to a Civilian Public Service camp is a "sentence" to imprisonment. Compulsory public service in time of war in lieu of military servce is not imprisonment, and the Selective Service boards do not impose sentences. Their functions are administrative rather than judicial; consequently, there

Act, and consequently the indictment, are so vague as not to provide an ascertainable standard of guilt (Pet. 34–37). In connection with the latter contention, petitioner overlooks the fact that whether the work to which he has been assigned is work of national importance under civilian direction is not a question for the court or the jury to decide in the determination of his guilt, or for him to have decided beforehand in determining what was required of him. Section 11 of the Act made it his legal duty to obey the order of the Board to report at its headquarters at 10:00 a. m. on August 24, 1942, and punishes intentional disobedience. This duty was not vague or unascertainable.[24] The indictment, following the language of the statute and of the Board's order to report, fully apprised petitioner of the nature of the charge against him so as to enable him properly to plead his defense and an acquittal or conviction in bar of a further prosecution for the same offense, and enabled the court to determine whether the charges were sufficient in law to support a conviction.[25]

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has been no unconstitutional delegation to them of judicial power. *Selective Draft Law Cases*, 245 U. S. 366, 389. The same reasoning disposes of petitioner's contention that in its application to conscientious objectors the Act is a "bill of pains and penalties" (Pet. 34) and therefore invalid. Cf. *United States ex rel. Pfefer* v. *Bell*, 248 Fed. 992, 993, (E. D. N. Y.).

[24] Cf. *Gorin* v. *United States*, 312 U. S. 19, 27–28.

[25] *Wong Tai* v. *United States*, 273 U. S. 77, 80; *United States* v. *Behrman*, 258 U. S. 280, 288; *Kaufmann* v. *United*

Petitioner is now contending (Pet. 3, 38) for the first time that Section 625.2 of the Selective Service Regulations (32 C. F. R. 652.2), by denying registrants representation by counsel in proceedings before the local boards, constitutes a denial of due process of law. This contention, so belatedly raised, should not now be open to him.[26] Furthermore, he has not shown that he ever asserted a right to be represented before the Board by counsel, or that such alleged right was ever denied him. Moreover, the Board gave him what he asked, which was to be classified as a conscientious objector (R. 60), so that in any event he was in no way prejudiced by lack of counsel in the proceedings before the Board and therefore may not complain of it.[27]

States, 282 Fed. 776, 778 (C. C. A. 3), certiorari denied, 260 U. S. 735; *Rose* v. *United States*, 128 F. (2d) 622, 624 (C. C. A. 10), certiorari denied, 317 U. S. 651. The indictment clearly was not deficient, as petitioner contends (Pet. 37), because of its failure to allege that the assignment in question was in lieu of induction into the armed forces, or that the work was to be under civilian direction. Even on the assumption that petitioner is correct in calling these requirements a "proviso" of the statutory authority, it is nevertheless well settled that an indictment, founded on a general provision defining the elements of the offense, need not negative the basis for an exception made by a proviso or other distinct clause, and that it is incumbent on one who relies on such a proviso to set it up and establish it. *McKelvey* v. *United States*, 260 U. S. 353, 357; *Seele* v. *United States*, 133 F. (2d) 1015, 1019 (C. C. A. 8); *Nicoli* v. *Briggs*, 83 F. (2d) 375, 379 (C. C. A. 10).

[26] See *Sonzinsky* v. *United States*, 300 U. S. 506, 514.

[27] *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56.

III

The validity of the statutory basis of the Board's order being clear, the Selective Service Regulations are determinative of whether the order was properly issued.[28] Assuming, as petitioner contends (Pet. 41), that the Board did not meet for the purpose of determining whether the order should issue,[29] we submit that the court below was clearly correct in holding that the Regulations make it mandatory for the Board, upon receipt from the Director of Selective Service of the assignment of a conscientious objector to a designated work project, to issue the order for him to report,[30] and that therefore "the order to report was not a discretionary order of the local draft board requiring the meeting of the board and a *determination* of the board to issue it" (R. 97).[31] The Board

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[28] *Ver Mehren* v. *Sirmyer*, 36 F. (2d) 876, 881 (C. C. A. 8); *United States ex rel. Bergdoll* v. *Drum*, 107 F. (2d) 897, 901 (C. C. A. 2).

[29] As the court below found (R. 98–99), however, the record properly raises the inference (cf. *Glasser* v. *United States*, 315 U. S. 60, 80), that the Board acted as a Board in issuing the order to report (R. 60).

[30] 32 C. F. R. 652.11.

[31] Section 10 (a) (2) of the Selective Training and Service Act (50 U. S. C. App. 310 (a) (2)) leaves to the local boards only the determination of "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act." Questions of procedure in the assignment of, and issuance of orders to, persons already classified by the board for service, as was petitioner (R. 60–62), are determined by reference to the Regulations authorized by the Act (50 U. S. C. App. 310 (a) (1)).

had exhausted its discretionary function when, in meeting and at petitioner's behest (R. 60–62), it voted as a board to accord him the conscientious objector's classification which entailed his subsequent assignment to a work project.[32] Petitioner's further contention (Pet. 40–41) that an order signed by one member is not the order of the Board is directly contrary to the provision of the Regulations that "the chairman or a member of the local Board must sign a particular paper when specifically required to do so by the provisions of a regulation" (Selective Service Regulation 603.59), and to Form 50 (the Order to Report for Work of National Importance), which is a part of the Regulations (Selective Service Regulation 605.51) and requires only the signature of a "member of local Board." A requirement that every member sign each order would obviously be impracticable. Here the order was signed by "Louis Davlin, member of local Board," who was also its secretary (Gov. Ex. 1; R. 13, 61). Being therefore issued in conformity with the applicable regulations, it was the order of the Board, as charged in the indictment.

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[32] Petitioner's contention (Pet. 44–45) that the Board was required to determine whether the work petitioner was already doing was of national importance, and if not whether he was qualified and willing to do other work, assumes a power in the Board to set aside regulations issued by the President in the exercise of authority properly delegated to him.

Petitioner's intentional disobedience of the Board's order, which was amply evidenced by his own testimony (R. 82–83) as well as by that of other witnesses (R. 60–61, 63, 65), was not, as he now contends (Pet. 37–38), divested of the quality of wilfulness [33] by virtue of his own self-justifying opinions.[34] One may not thus place himself above the law.

IV

Petitioner assigns a multitude of alleged errors (Pet. 4, 47–55) which do not require extensive consideration.

a. The fact that five members of the jury panel were former employees of the Post Office Department provided no basis for petitioner's attack upon the panel (Pet. 47; R. 90), since bias may not be imputed on the basis alone of previous Government employment,[35] and no actual bias was charged.

b. The record references (R. 91, 98–100) on which petitioner bases his charges of prejudice

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[33] Although the indictment charged a "wilful" failure to comply with the board's order (R. 2), Section 11 of the Act (50 U. S. C. App. 311) requires only that one shall "knowingly" fail. Under either term petitioner's contention clearly has no merit.

[34] *Browder* v. *United States*, 312 U. S. 335, 340–341; *United States* v. *Illinois Central R. R. Co.*, 303 U. S. 239, 242–243. *United States* v. *Murdock*, 290 U. S. 389, 395, relied on by petitioner (Pet. 38), in no way sustains his position.

[35] *United States* v. *Wood*, 299 U. S. 123, 149; *Baker* v. *Hudspeth*, 129 F. (2d) 779, 783 (C. C. A. 10), certiorari denied, 317 U. S. 681.

toward him on the part of the courts below (Pet. 47–49) carry their own refutation of such charges.

c. At various times in the course of the trial the judge and counsel, together with the court reporter, retired to the judge's chambers to consider motions or offers of proof in the absence of the jury (R. 66, 68, 76). Petitioner challenges this procedure on the ground that he was not present in the judge's chambers (Pet. 50). But the confrontation rule has no such novel application as petitioner attributes to it. His counsel willingly participated without objection, the record does not show that petitioner was in fact barred from the conferences in the judge's chambers, and no prejudice of any kind resulted.[36]

d. A reading of the prosecutor's entire argument before the jury (R. 83–85) does not bear out petitioner's contention (Pet. 51–52) that he exceeded the bounds of propriety, as petitioner's own counsel clearly did (R. 86–87). In any event, one may not, as petitioner has done, sit idly by throughout the opposing counsel's argument without objection, and then, when it is too late to correct any possible impropriety, charge for the first time on appeal that the trial judge should have done that which he himself did not choose to do.[37]

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[36] Cf. *Johnson* v. *United States*, 318 U. S. 189, 201; *Steiner* v. *United States*, 134 F. (2d) 931, 935 (C. C. A. 5), certiorari denied, June 14, 1943, No. 1037, October Term, 1942.

[37] As in *United States* v. *Socony-Vacuum Oil Co.* 310 U. S. 150, 239, the exceptional circumstances that justify a departure from this rule are not present here.

e. The trial court's rulings concerning the admissibility of evidence, of which petitioner complains (Pet. 50–51), were free of prejudicial error. The proffered testimony and magazines, circulars, pamphlets, and letters which the court declined to receive on his behalf (R. 68–69, 75–81), were all irrelevant and were, in addition, for the most part hearsay. Petitioner's entire draft board file being in evidence (R. 71), the court clearly did not err, as petitioner contends (Pet. 49), in declining to require the Chief Clerk of the Board to produce a large entry book which was kept available for public inspection at the Board's headquarters and which, as regards petitioner, contained only recordings identical with those on the cover sheet of the file then before the court (R. 71). The admission in evidence against petitioner of his sworn statement, given to a representative of the Federal Bureau of Investigation who was called to the Milwaukee Police Headquarters to interview him shortly after he had voluntarily gone there with a policeman to whom he had made incriminating statements (R. 63–66), obviously did not violate his constitutional privilege against self-incrimination (see R. 64), as he now contends (Pet. 49, R. 64). The statement being wholly voluntary, it was plainly admissible as a prior admission.[38] Moreover, the statement was merely cumulative

[38] Cf. *Wilson* v. *United States*, 162 U. S. 613. Petitioner does not contend that error existed comparable to that in *McNabb* v. *United States*, 318 U. S. 332.

of his own testimony given at the trial by which he waived the privilege.

Contrary to petitioner's contention (Pet. 49–50), the cross-examination that the court allowed after he had taken the stand as a witness in his own behalf did not exceed the scope of his direct testimony or constitute an abuse of the court's discretion in the matter.[39]

f. The trial court's charge to the jury (R. 35–39) was eminently fair, and petitioner took no timely exception thereto (see R. 40).

CONCLUSION

Petitioner had a fair trial and his conviction is adequately supported by the evidence. No question is presented which warrants further review. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
OSCAR A. PROVOST,
Special Assistant to the Attorney General.
VALENTINE BROOKES,
IRVING S. SHAPIRO,
Attorneys.

SEPTEMBER 1943.

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[39] *Glasser* v. *United States*, 315 U. S. 60, 83.

APPENDIX

The Selective Training and Service Act of 1940 as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; Aug. 18, 1941, c. 362, 55 Stat. 626; Dec. 20, 1941, c. 602, 55 Stat. 844; Nov. 13, 1942, c. 638, 56 Stat. 1018,[1] in pertinent part provides:

> SECTION 1. (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service. (50 U. S. C. App. 301 (b).)
>
> * * * * *
>
> SECTION 5. (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in

[1] Amendments enacted after the facts of the present case arose in no way affect the pertinent provisions.

such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. * * *

* * * * *

SECTION 10. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. * * *

* * * * *

(c) In the administration of this Act voluntary services may be accepted. * * * (50 U. S. C. App. 310 (a) (1) (2), (c).)

* * * * *

SECTION 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. * * * (50 U. S. C. App. 311.)

The Selective Service Regulations in pertinent parts provide:

603.59 *Signing official papers.*—Official papers issued by a local board may be signed by the clerk "by direction of the local board" if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board, provided that the chairman or a member of a local board must sign a particular paper when specifically required to do so by the provisions of a regulation or by an instruction issued by the Director of Selective Service.

* * * * *

605.32. *Information not confidential as to certain persons.*—No information shall

be confidential as to the persons designated in this section, and any information may be disclosed or furnished to or examined by such persons, namely:

(1) The registrant, or any person having written authority from the registrant.

* * * * *

625.2 *Appearance before local board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. * * * No registrant may be represented before the local board by an attorney.

* * * * *

622.51 Class IV–E: *Available for work of national importance; conscientious objector.*—(a) In Class IV–E shall be placed every registrant who would have been classified in Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

* * * * *

652.1 *Report of conscientious objector to Director of Selector Service.*—(a) When a registrant in Class IV–E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction.

* * * * *

652.2 *Assignment by Director of Selective Service.*—(a) The Director of Selective Service, upon receipt of * * * the Conscientious Objector Report (Form 48) for a registrant * * * shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), * * *.

652.11 *Preparation and distribution of Order to Report; delinquency of IV–E registrants.*—(a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV–E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. * * * When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law.

* * * * *

652.14 *Period of service.*—(a) A registrant in Class IV–E who has been assigned to a camp shall be engaged in work of national importance under civilian direction during the existence of any war in which the United States is engaged and during the

6 months immediately following the termination of any such war, unless sooner released under the same conditions as pertain in the armed forces.

* * * * *

653.1 *Work projects.*—(a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all work projects is vested in the Director of Selective Service.

653.2 *Camps.*—(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a Federal technical agency using funds provided by the Selective Service System and operating

under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service.

U. S. GOVERNMENT PRINTING OFFICE 1948

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 220

WALTER FORD GORMLY,
Petitioner-Appellant,
vs.
UNITED STATES,
Respondent-Appellee.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

MOTION FOR REHEARING AND BRIEF THEREON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 220

WALTER FORD GORMLY,
Petitioner-Appellant.

vs.

UNITED STATES,
Respondent-Appellee.

PETITION FOR REHEARING

To the Supreme Court of the United States:

Comes now Walter Ford Gormly, petitioner-appellant in the above entitled cause, by his attorney, and presents this his petition for a rehearing on the order of the Court denying his petition for writ of certiorari, and in support thereof respectfully shows:

1. That the judgment below, sought to be reversed, is based upon an order of an administrative tribunal which petitioner claims to be invalid because:

a. Issued for the purpose of incarcerating defendant in a penal institution known as a Civilian Public Service Camp, and subjecting him to involuntary servitude without compensation, and not as a punishment for crime;

b. The Selective Training and Service Act of 1940 does not expressly, or by implication, authorize the regulations which have been issued providing for such incarceration and involuntary servitude;

c. The regulations issued under said Selective Training and Service Act of 1940 do not contain any provisions authorizing the Director of Selective Service or the Local Administrative Board in question to issue the order upon which this criminal proceeding is based, or any similar order;

d. The Local Board did not authorize or issue the order.

2. The trial court committed error in refusing to receive testimony demonstrating that the order in question is invalid because imposing involuntary servitude, contrary to the Fifth Amendment and Thirteenth Amendment to the Constitution of the United States, and in failing to take judicial notice that Civilian Public Service Camps are penal institutions, and that persons assigned there, including defendant, are subjected to involuntary servitude not as punishment for crime, and in failing to apply the fundamental law of the land with respect to the several points listed at paragraph 1 above. The cases decided in *Arver vs. U. S.*, 245 U. S. 366, did not involve any question with respect to the incarceration of conscientious objectors for the purpose of forced labor without compensation.

3. This Court, prior to denying petitioner a writ of certiorari, granted a writ in the case of *Nick Falbo vs. United States of America*, (3 Cir., 135 F. (2) 464), October Term, 1943, No. 73, wherein the questions at issue in this case are also at issue, and where, as in petitioner's case, the issue was and is as to whether the invalidity of the Local Board's induction order can be urged as a defense to the indictment for failure of the defendant as a civilian to obey the order of such administrative tribunal.

4. At the same time that petitioner's petition for writ of certiorari was denied this Court granted a petition for writ of certiorari in the case of *Billings vs. Truesdell*, (C. A. A. 10, 135 F. (2) 505), October Term, 1943, United States Supreme Court, involving, as petitioner believes, the question as to whether the invalidity of an order of a Local Draft Board is ground for releasing him from military service and jurisdiction of the military authorities.

5. The brief of petitioner recited a number of instances wherein the decision of the Circuit Court of Appeals was inconsistent with decisions of other Circuits and with general law.

6. That justice requires that this petitioner have an equal opportunity to be heard in this Court on the grounds common in his case with those in the cases of *Nick Falbo* and *Arthur Goodwyn Billings*, mentioned above.

WHEREFORE, it is respectfully urged that this peti-

tion for a rehearing be granted and that the petition for a writ of certiorari, heretofore denied, be granted.

Dated at Milwaukee, Wisconsin, this 22nd day of October, 1943.

Respectfully submitted,

PERRY J. STEARNS,

Counsel for Petitioner.

I, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PERRY J. STEARNS,

Counsel for Petitioner.

BRIEF SUPPORTING MOTION FOR REHEARING

To the Supreme Court of the United States:

Comes now Walter Ford Gormly, petitioner in the above entitled cause, and presents this his brief in support of his petition for a rehearing on his petition for certiorari and the order denying said petition. Petitioner respectfully shows:

1. The questions raised in petitioner's brief in support of petition for writ of certiorari affect the freedom and liberties of thousands of men sincerely and conscientiously opposed to war as an implement for the adjudication of international disputes, and to personal service in the use of such instrument.

2. The regulations issued under the Selective Training and Service Act of 1940 depart from the Act, and require every conscientious objector to war to go to Civilian Public Service Camps and to sacrifice his freedom and his earnings for the duration of the war, or go to jail, contrary to the expressed intent of Congress that such conscientious objector shall, in lieu of induction, be assigned to work of national importance under civilian direction.

3. The Solicitor General in his brief indulges (vacuum in vacuo) in assertions which state and restate the Government's position, but do not answer or meet the arguments and citations of petitioner demonstrating that petitioner has been sentenced to jail for refusing to be subjected to involuntary servitude, sought by the Selective Service System to be forced upon him contrary to the 5th and

13th amendments to the United States Constitution and contrary to said Act of 1940.

The brief on this motion is confined substantially to the point of involuntary servitude, without, however, abandoning other points or conceding the validity of the argument of the Solicitor General with respect to such other points. References to petitioner's brief and to the brief in opposition are indicated by the letters "G" and "S" respectively.

INVOCATION OF DIVINE WISDOM

At the outset petitioner offers his prayer to Diety. He speaks not for himself alone but for thousands similarly situated. He speaks not for conscientious objectors alone but for all who labor. He speaks not for this day alone but for future ages. He prays that his petition may so express the truth that moves him as to penetrate that inertia which threatens to thwart the principles of freedom and justice for which only he makes his sacrifice. May the film of prejudice by which this and a companion case was enveloped below by unjust charges of ingenuity, triviality, frivolity, contumacy, sabotage and self-exaltation be pierced at length by American fair play. He prays that the spirit which moved Congress to recognize the validity of the position of the conscientious objector may be shared by the officers and courts charged with the interpretation and administration of that law. He prays that the same principles of law and justice which have developed through the years for the construction of statutes generally and the protection of persons charged with crime generally may obtain in cases arising under the Selective Training and Service Act of 1940, uninfluenced by war hysteria or political considerations. He prays that the principles of freedom and equality may prevail against the advocates of the use of force. May his efforts be inspired by Thee and work to advance the hour of emancipation of those who suffer for conscience sake at the hands of the enforcers of conformity, whether they are in jail as convicts under an unjust regime after a trial in form, or in camp as assignees of a crafty system of imprisonment without benefit of trial or authority of law. May the voice of Almighty God speak through the members of this Court to end all such oppression throughout the land.

BRIEF

I. PETITIONER'S CASE IS EQUALLY AS IMPORTANT AS CASES IN WHICH WRITS HAVE JUST BEEN GRANTED.

Counsel for petitioner is informed that this Court recently has granted writs of certiorari in *Nick Falbo vs. United States,* (135 F. (2) 464, C. C. A. 3), No. 73, October Term, 1943, and *Billings vs. Truesdell,* decided by C. C. A. 10, its No. 2661, April 30, 1943, (135 F. (2) 505).

The Falbo case.

Counsel for Nick Falbo have favored us with a copy of their brief, and references to the Falbo brief are designated by the letter "F".

At argument 1 (F. 23) counsel argue that petitioner has the right to urge as a defense the invalidity of the induction order. Counsel state (F. 14) that petitioner Falbo does not ask for that which is not allowed by law, and (F. 11) recites that complete exemption is granted ministers of religion, except as to registration. Counsel state, as a virtue (F. 12) "Neither petitioner * * * nor Jehovah's Witnesses consider the Selective Training and Service Act as unconstitutional."

Present petitioner has indicated (G. 29) that he, no more than Nick Falbo, is not required to show that the Selective Training and Service Act is unconstitutional Petitioner claims that the regulations have injected into the Conscription Act a provision not found in the Act of 1917 and not authorized by the Act of 1940, and that such new feature is unconstitutional as well as illegal. Accordingly petitioner's prayer cannot be dismissed on the authority of the Arver cases. A new Act and new regulations are here presented as the Solicitor General concedes, saying, "This experience of the first world war showed the propriety of making a *different provision* * * *" (S. 10) (emphasis ours).

Counsel (F. 14) properly points out that the defendant, Nick Falbo, by making a test case is not defying or flouting the law. Petitioner Gormly was prejudicially charged, directly or by insinuation, with flouting the law (R. 84) when the District Attorney stated to the jury:

> "The Defendant himself, though, sets himself up above that law. * * * He is sufficient unto himself.

> No matter what the other millions of people in the country might say or feel, he is going to determine for himself whether or not he should obey this law."

For petitioner to defend himself in criminal court on the ground of the invalidity of a regulation not conforming to the Act is as absolute a defense as defending on the ground of a misclassification based on the ministerial exemption. The *constitutional* provision against involuntary servitude is as absolute, if not more so, than the *legislative* exemption granted ministers.

As counsel (F. 23) point out, the accused, upon the trial of a criminal charge may urge, without limitation, any and all defenses that are available. This fundamental right was denied petitioner Gormly and the attempted exercise thereof was the subject of caustic comment in the opinions of the appeal court below.

Yet, the Circuit Court of Appeals, as shown by the record, did not express a judicial opinion on most of the defenses raised by the petitioner, but (R. 96) dismissed them, some as having been sufficiently treated in the case of *U. S. vs. Mroz*, 136 F. (2) 221, and (R. 99) others with the remark:

> "Various other contentions made by counsel for defendant, have been considered and are all rejected. We refer to only one to illustrate how devoid of merit they are."

The appellate court takes a final thrust at counsel's industry in presenting all defendant's available defenses without limitation by stating (R. 100):

> "A Court is not required to take under advisement every motion made by ingenius counsel."

The appeal court then figuratively speaking leaves the bench, intimates its abhorrence of the person who will not fight, and reveals its opinion that defendant is attempting to flout the law, saying (R. 100):

> "Unfortunately, defendant is not the only one of the group which is determined not to take up arms in their country's defense. Much time is taken in an effort to make clear the issue which confronts the citizen who refuses to obey the command of his Government. Perhaps it is wasted time."

It is a deplorable situation which can only be righted by this Court when an august appellate tribunal in this country considers that it is wasting time in considering

defenses presented and argued in good faith and on fundamentally sound authority.

The question raised by petitioner in defense that he is not bound to accept an assignment to take such work as the Director of Selective Service may parcel out to him is in the nature of an absolute defense based upon constitutional principles and rules of natural law. It is as absolute in the constitutional sense as Mr. Falbo's claim of being a minister is an absolute defense under the legislation in question. While this Court is not asked in this case to consider the constitutionality of the Selective Training and Service Act of 1940 as a whole, it is bound to review, and at no distant future date, the constitutionality of the regulation claimed to be issued pursuant to that law under which the right is here asserted to assign innocent men to civilian activities in a penal camp against their will whether with or, as here, without pay. It is just as absolute a defense in the legislative as well as in the constitutional sense that the order claimed to be issued was in fact not issued (G. 40-45), and also that the law and the regulations do not in terms authorize the issuance of any such order (G. 32, 33, 35, 36), as is the legislative defense of ministry (Sec. 5 d, 50 U. S. C. App. 305) in the *Falbo case.*

Petitioner's brief (G. 40-45) demonstrates that the Act and regulations contain no express authority to the Director of Selective Service or to Local Boards to issue orders directing civilians when and where they must report for work of national importance, or requiring them to accept any such assignment. The Solicitor General has shown none. He apparently rests on the opinion below (R. 97) which quotes the Regulation to the effect that when Form 50 is mailed to a registrant, *"it shall be his duty to comply."* This answer is inadequate. It does not answer petitioner's charge that neither law nor Regulations provide that the local board or any other agency may order an American citizen to leave his home and report for work at some distant place in a concentration camp at forced hard labor without pay. This court in the Bowles Case (318-319 U. S.; 63 S. C. 758, 912, 1323) took judicial notice of a fact not part of the record. *A fortiori*, the court will take judicial notice of the Regulations, showing the methods of assignment to Civilian Public Service Camps, the restrictions therein, the lack of compensation and, blessed irony, the requirement that those whose earnings

are confiscated by a benevolent government shall nevertheless provide their own board and keep. Congress surely meant by "assigned to work" to include the ancient principle, "The workman is worthy of his meat." Matthew 10:10, as to those accepting such an assignment.

Counsel (F. 39-44) argue that the availability of the writ of habeas corpus as a remedy does not limit the defenses available in criminal cases. With this we are in accord. The Third Circuit in *U. S. vs. Grieme,* 128 F. (2) 811, 815, suggested that the writ of habeas corpus was the proper remedy and that the invalidity of the order was not a defense. It will be observed that the court below in both the *Mroz and Gormly cases* (136 F (2) 221, 227) does not suggest the writ of habeas corpus as the proper remedy. The Seventh Circuit sweeps out all defenses as trivial and does not even hold out the hope of such remedy of habeas corpus.

Petitioner agrees with counsel (F. 49-53) that the order of the Local Board is a final order in that it attempts to make a final disposition of petitioner's rights. Since this issue will be argued in the *Falbo case,* the Court should be interested in argument that nothing contained in Act of 1940 or regulations thereunder authorizes the Local Board to issue such an order. If certiorari is denied petitioner the issues with respect to the power of the local board to make this order will not be presented to the court. The court in the *Falbo* and *Billings* cases may be engaged in a futile consideration of the effect of an order when such order is invalid *ab initio* and without legal basis.

Counsel (F. 54-58) argue in effect that to fail to permit the defense of the invalidity of the order of the board to be raised the courts become mere factotums for the boards, and thus surrender their judicial duties. Petitioner is thus denied his right of trial by jury. In substance, it is the argument of petitioner (G. 32-34) that the order to report for induction to a Civilian Public Service camp for incarceration is a judicial order and its exercise by a board an unconstitutional delegation of judicial power. Petitioner *Gormly* should have an equal right with petitioner *Falbo* to be heard with respect to this point.

Counsel argue (F. 64-66) that the reason for judicial review is as strong with respect to administrative boards created under the Selective Service Law as with other administrative bodies. This is true. It was in disregard of

this principle that the trial court instructed the jury (T. 37) that the defendant was

> "ordered assigned to such a camp and ordered to report for service at such a Public Service Camp.
>
> "Now, if you believe from all the evidence, and beyond a reasonable doubt, that this defendant was duly classified by his Draft Board in Class IV-E, and that thereafter a valid order to report for induction was given to the defendant and that he wilfully and knowingly failed or neglected to comply with such order, as charged in the indictment, then you may find the defendant guilty. * * *
>
> "Neither this Court nor the jury can review the actions of the Selective Service Boards. Those actions are final. They determine them. In this case the Selective Service Board considered what this applicant said with reference to his conscientious objections. He was classified as a conscientious objector, placed in Class IV-E, and no appeal from that classification was taken.
>
> "Therefore, there are two questions presented to the jury: First of all, was the defendant ordered to appear? Did he receive such an order?, and secondly, did he fail to report?"

Thus the question of the sacrosanct position of the order of the local board is the same in both the *Gormly* and *Falbo* cases.

The court failed to give the instruction requested (T. 30 (4)) with respect to the necessity that an order of a Local Board be made or issued at a regular meeting of the Board. The record shows that the order in question was not made or issued at any meeting of the board or as a result of a vote of the board. The Regulations show that this is regular practice. This raises a question with respect to the validity of all orders of the Boards which is as of as great public import as the questions bearing upon the validity of the order in the *Falbo case*. It is not the usual custom of this Court when devoting its attention to great public questions to do it by halves.

Billings case.

In *Billings vs. Truesdell*, C. C. A. 10, 135 F. (2) 505, 506, (certiorari granted), petitioner predicated his prayer for writ of habeas corpus on the ground that he had not

been inducted into the Army and therefore the military authorities had no jurisdiction over him.

The appeal court cites Sec. 11 of the Act, 50 U. S. C. A. App., Sec. 311, making it a criminal offense for any person knowingly to fail or neglect to perform any duty required of him under the Act, and providing that no person shall be tried by any court martial unless such person has been actually inducted for training and service under the Act. The Gormly case involves this same section 11. The court summarizes the regulations giving, step by step, conscription procedure from the order to report to the act of induction, and the War Department regulations with respect to induction and taking the oath.

The decision of the court is embodied in the last paragraph of the opinion before the conclusion (p. 507). It adopts the superficial reasoning and argument advanced by the Solicitor General in his brief in opposition to this petitioner's prayer for a writ of certiorari, saying:

> "The underlying theory of the Act is that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."

and further:

> "Presumably, the question before this Court in determining the writ of certiorari will be whether induction is a matter of choice with the proposed inductee."

This is the same question involved in the present case. Petitioner *Gormly* declined to choose to be inducted. He did so before being transported to camp instead of after. The same fundamental question is involved in *Mr. Gormly's* case as in *Mr. Billing's* case and they should be presented together. Accordingly, petitioner's motion for rehearing should be granted.

II. BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner did not consider it necessary to file a reply to the Solicitor General's brief for the United States in this case because it did not meet the argument of petitioner, nor answer, on their merits, the citations of decisions of this Court contained in petitioner's brief.

Petitioner requested the Court below (T. 31) to instruct the jury that filing the questionnaire, in which the defendant indicated that his proper classification was IV-E, did not constitute a waiver of any constitutional right as an American citizen. The Solicitor General argues (S. 16):

> "Moreover, the Board gave him what he asked, which was to be classified as a conscientious objector (R. 60) * * *."

This argument of waiver, if so intended, is unworthy of the high office of the Solicitor General.

At Series X of his questionnaire (p. 6), the record shows that petitioner stated that he was conscientiously opposed to participation in noncombatant military service, and at (p. 7) he gave his opinion that his classification should be Class IV.

Pursuant to the regulations, by which the same is made a part of the questionnaire introduced as Government's Exhibit 2, the petitioner in the special questionnaire (Form 47) again declared his claim for exemption from any service under the direction of military authorities. The Solicitor General cannot find in these questionnaires or in any other place in the record, an agreement by the petitioner that if he were classified as IV-E he would forego his constitutional privilege of resisting involuntary servitude and incarceration in a Civilian Public Service Camp at labor without compensation. Obviously, if such a waiver were made it would be without consideration, and void and would not prevent a freeborn American citizen setting up his constitutional rights under the Fifth and Thirteenth Amendments to the Constitution.

Petitioner was and is entitled to fair treatment at the hands of the Solicitor General. It was unfair to attempt to prejudice petitioner's case by the statement (S. 3):

> "His conscientious objection to military service is not based on any tenets of the Methodist Church of which he is a member (R. 65, 82), but rather on philosophical readings (R. 64)."

The intimation of the Solicitor General is that defendant was not a conscientious objector because, in his statement to the F. B. I., (to the introduction of which objection was made and exception taken), he said:

> "I have been influenced by reading 'The Power of Non-Violence,' by Richard B. Gregg, and by reading 'War Without Violence,' by Krishmalal Shridharani."

We do not know by what authority the Solicitor General claims to catalogue these books "as philosophical readings," rather than religious.

The United States has argued at all times that the findings of the Local Board shall be final, and the Local Board in this case found the defendant to be a conscientious objector within the meaning of the Act. The Solicitor General evidently considers it expedient to depart from the principle of finality when he thinks it may further his purposes, regardless of injustice to petitioner. There is no evidence in the case that the Local Board ever had the F. B. I. statement before it in making its classification, and presumably the Solicitor General might admit that it is within the realm of possibility that there was other evidence before the board to support its finding that the defendant's conscientious objections to war are based upon religious training and belief.

Let us next consider argument 2 as presented (S. 8-15). It is a characteristic expedient of those who do not wish to meet an argument on its merits, to belittle it, and the Solicitor General adopts the same approach as was adopted by the Appeal Court below. Petitioner declines to be pooh poohed out of Court, and out of his freedom.

The Solicitor General (S. 8) says that compulsory military service, regardless of religious beliefs, does not constitute involuntary servitude, and exemption therefrom is discretionary with Congress. Petitioner has attempted to make it clear to the Solicitor General, without success, that it is unnecessary to the petitioner's case to argue the validity of this point. Accordingly, petitioner has not considered it necessary to determine whether the cases cited by counsel (S. 8, notes 11, 12) support these propositions. The Solicitor General, however, is correct in stating it to be petitioner's position that the grant of power to raise armies is not a grant of power to conscript men for non-military purposes, entirely outside of the armed forces. The mere fact that an army needs supplies does not make those whose labor produces the supplies a part of the army. This is obvious.

The words of the Selective Training and Service Act of 1940, "be assigned to work of national importance," is the first attempt by Congress so far as we know to extend the constitutional power to raise armies to include the "draft of manpower" (as the Solicitor General softly puts it

(S. 11)), for other than military purposes. It is strange the Solicitor General should object to having this novel application of Congressional power subjected to searching review by this court. This court should subject to review such a novel exercise of Congressional power as well as the administrative extension thereof involved in this case.

Counsel argue (S. 9) that the

> "provision for assigning conscientious objectors to work of national importance under civilian direction is a necessary and proper adjunct * * * to the execution of the power to wage war and raise armies, * * *."

This argument is both improper and untrue. Improper, because constitutional prohibitions for safeguarding the liberty of the citizen are not to be obliterated on any ground of expediency. Untrue, because the British Government, which was in the war before we were, has not found the creation of Civilian Public Service camps to be necessary to execution of the power to wage war and raise armies.

In a "Memorandum on the National Service Acts, 1939-41," prepared for the War Resisters International by Charles H. E. Hill, January, 1942, obtainable from H. M. Stationery Office, York House, Kingsway W.C. 2, London, Eng., the author states of National Service Acts of 1939 and 1940, and National Service Acts of 1941 that the conscientious objector in England may be refused exemption or may be exempted from combatant service only, or may be exempted from all military service, with or without conditions. Since the English law permits exemptions without conditions, it is clear that the English have not found it necessary to their power to wage war and raise armies to impose conditions in all cases. In the "Conscientious Objectors and the National Service Acts" published by Central Board for Conscientious Objectors, 6 Endsleigh Street, London, W.C. 1, April, 1942, p. 9, item 13, it is stated:

> "After you have been provisionally registered as a conscientious objector, the Ministry may decide that you are in a reserved occupation; in that event they will send you a circular informing you that you will not be called before a Tribunal until you cease to be reserved or change your job."

and page 10:

> "If you are not 'reserved,' your employer may,

whether you are a man or woman, apply on Form N.S. 300 to have your calling up *deferred* on the ground that it is in the national interest that you should not be moved from your present work."

And at p. 14, item 23:

"IF YOU ARE REGISTERED CONDITIONALLY

"The Tribunal must specify 'work of a civil character under civilian control,' and such work may be either whole-time, paid or unpaid. The Tribunal usually specifies the *nature* of the work, and not a particular firm or employer. The Ministry can direct you to undergo training for the work specified.

"If you are required to do whole-time work different from your ordinary job, you must try to find it yourself. An obvious step is to apply to a Labour Exchange for help."

The court may take judicial notice that in England the Civilian Public Service camp or concentration camp has not been adopted for its own citizens as an instrument of national policy. The concentration camp for self-reliant citizens is a fascist practice, not Anglo-Saxon. Even if it were otherwise the fact remains that the United States unlike England is operating under a written constitution which the Bar is under oath to support. The plea of necessity must give way to the plea of propriety when the Constitution forbids, as it most certainly does with respect to the "drafting of manpower" for civilian purposes.

Untrue also, because the United States long has used its constitutional power to wage war and raise armies, and never until 1940 found it necessary to provide for "assigning" manpower for civilian purposes, or as anticipatory incarceration or punishment for holding religious scruples against war. Untrue also, because an argument of expediency is relative and does not demonstrate necessity.

Counsel (S. 9) cite the Act of 1917, exempting conscientious objectors only from combatant service and the Furlough Law of 1918 permitting conscientious objectors to be furloughed to engage in work under civilian direction. The Solicitor General does not give us the benefit of his research to show how this alleged work under civilian direction was conducted. He should have informed the Court whether such work under civilian direction was conducted in a concentration camp, and whether the conscientious objector

so furloughed was deprived of the benefits of his liberty, and required to pay his own board while his earnings were confiscated. If not, his argument falls short and the Act of 1918 is to be distinguished.

The Solicitor General is correct in saying that the presence of conscientious objectors in the army presented a serious problem of discipline and morale (S. 9). There may be an equal problem of unity and morale if the Government persists in a policy of subjecting free citizens to incarceration, not as punishment for crime, and without compensation, thrown on charity. But, petitioner is not concerned with arguments of expediency since his position is based upon the fundamental natural rights of a free man guaranteed by the Fifth and Thirteenth Amendments to the Constitution of the United States, and which this Court is duty bound to uphold when a citizen seeks protection.

The Solicitor General says (S. 10) the experience of the first world war showed the propriety of making a different provision for conscientious objectors. Equality was the theory on which universal conscription was based (S. 23). He concedes that conscription of conscientious objectors presented a considerable problem to the Army (S. 9) showing the propriety of a different provision (S. 10). He seems to think that the correct solution has now been found (S. 10). These arguments of the Solicitor General are political and should be addressed to the Legislature. They should not be addressed to this Court in determining questions of right and law and justice. He hurdles so far and high as to lose contact with earth when he says (S. 10, 11) the sec. 5g (S. 24 top) means "assignment to work analogous to noncombatant service in the armed forces." Neither the Act nor this record supports this bald assertion.

Petitioner's brief on his petition for writ of certiorari was based on decisions of this court which have not been overruled and which the Solicitor General does not answer in his brief, except by arguments based on policy and expediency (S. 8-15), not addressed to the principles of law involved in said cases.

Counsel cites the preamble at Sec. 1 of the Selective Training and Service Act of 1940 as evidence that the principle of equality requires that conscientious objectors

be subjected to the same compulsion as is accorded to those inductees who might otherwise offer to fight for their country and a just cause. (S. 10, 23) Congress recites that in a free society obligations and privileges should be shared generally in accordance with a fair and just system. By Sec. 5 certain exemptions were created which negative somewhat this so-called equality.

Congress, in this preamble emphasized the words "free society." In the Preamble to the Constitution of the United States, immediately following the words "promote the general welfare" are the words "and secure the blessings of liberty to ourselves and our posterity." It will also be noted that so experienced a constitutional lawyer as Cooley points out that the policy of this country is to avoid compulsion in matters of religious scruples and "even in the important matter of bearing arms for the public defense, those who cannot in conscience take part are excused. * * *" (G. 47). To enslave conscientious objectors is not to treat them equally with others within the meaning or purpose of the Act.

What we are urging is that the Director of Selective Service has departed from the principles of freedom and equality enunciated by Congress, and has given the conscientious objector a position in the Selective Service System below that of other persons subject to the Act, subjecting them to slavery without any authority from Congress. The Director, by his regulations, has extended the language of the Act of Congress "be assigned to work of national importance under civilian direction," to make it read in effect "be assigned to work of national importance under civilian direction *in concentration camps without compensation.*" This bold innovation on the Act of Congress commands attention, and should be promptly repudiated for what it is. It is bureaucratic interference with the free rights of citizens unnecessary to the power to wage war and raise armies. The Solicitor General (S. 10) begs the question before the court by stating:

> "Their assignment to work analogous to non-combatant service in the armed forces, but under civilian direction to avoid offending their own consciences, is clearly within the Congressional power. Congress has not, as petitioner contends (Pet. 30) annexed an unconstitutional condition to a privilege * * *."

The Director did the annexing.

He assumes what is to be proven. He merely negates where he should analyze. Obviously analysis would disclose the indicia of slavery pointed out by petitioner. (G. 28-9). So the Government finds it safer to negate than to analyze.

So, the Solicitor General chooses to meet the argument (G. 27, 31) and the decisions of this court, there cited, that an unconstitutional condition cannot be annexed to or imposed as the price of a privilege, by a bare statement of his contention without citation of authority.

This court said in *U. S. vs. Chicago M. St. P. & P. R. Co.*, 282 U. S. 311; 51 S. C. 159, 163:

> "It long has been settled in this Court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possesses the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant. There are many decisions to this effect; * * *."

This general principle applies with equal force to the United States.

Petitioner has been hustled by summary proceedings and rulings through trial and appeal and now is given a brush-off by the Solicitor General. Called to pass upon the liberty of this citizen and thousands of others similarly situated, he dismisses so important a right with mere negation and gloss: "Congress has not * * * annexed an unconstitutional condition to a privilege, but has provided for a draft of manpower for two different purposes: service in the armed forces, and work of national importance of a nonmilitary character?" (S. 11). In pleading, answering by conclusions of law without ultimate facts, would be dismissed as frivolous, avoiding the merits of the issue.

The Solicitor General, for reasons which are obvious to petitioner, has not answered the points, nor met the issue made in petitioner's brief: first, (G. 28, 29) that there are at least nine flagrant evidences of involuntary servitude, ranging from an order to labor without the consent of petitioner, to denial of compensation; and second, that such compulsory service is not within the constitutional provisions by which the Act of 1917 was justified, namely, power to raise armies. Does he fear that to dignify petitioner's position with serious treatment would concede

too much in petitioner's battle for constitutional freedom vs. total militarism in this once Christian nation. If the issues were fairly presented to the court, natural principles of justice might prevail and the Government's house of cards supported by force might fall.

The Solicitor General should be aware of the plot which seems to be brewing among bureaucrats in this country to draft labor for any and every purpose deemed expedient by bureaucracy under some vast delegation of authority from Congress. If such an outrageous program is attempted the wrath of a free people will destroy the bureaucratic house of cards and bring the enemies of free enterprise and free labor to just retribution as enemies of their country, as indeed they are.

This attempt to subject conscientious objectors to slavery is the entering wedge for the larger program which they have not yet dared to put into effect except upon a so-called voluntary basis. This court cannot remain unaware of danger to the fundamental security of our free people. Petitioner is here using plain language to bring the danger sharply in focus. The Courts, as ever, must be the final bulwark of constitutional liberties. Petitioner earnestly objects to any failure to take cognizance of the danger and refusal to protect his constitutional rights on the flimsy excuses offered by the Solicitor General.

It is not a question of usefulness, as the Solicitor General argues (S. 11). Petitioner declines to be drawn into questions of policy which are for legislative determination. Petitioner prays that the Solicitor General be required to address his brief to the issues of law which have been raised. One issue is whether the Director of Selective Service has departed from the language of the Selective Training and Service Act of 1940 by adding through his regulations to the language of the Act, quoted above, an extension of his personal power, interfering with the freedom of persons subject to the Act in a manner not required by or provided for therein. While it may be that military service requires the person subjecting himself thereto to leave his home and usual place of employment, it does not follow that a person accepting an assignment to work of national importance need leave his home town and present job.

Congressional grants of power in derogation of common right are to be strictly limited, and the words "be assigned

to work of national importance" do not imply that the Director of Selective Service shall originate or create work, but only that he may assign to work.

Since assignee is a free agent the Director cannot write into and add to the Act of Congress a power to compel the acceptance of the assignment if the assignee refuses to accept. The Act, as quoted by the Solicitor General (S. 23, 24) contains no power to force a free citizen to accept work under civilian direction. The Director may assign, but he cannot compel, and the Solicitor General has pointed out no language of the Act which confers the power of compulsion. Power of compulsion against natural and constitutional right cannot be implied. The cases supporting this principle of statutory construction are common.

PARSONS vs. BEDFORD, 28 U. S. (3 Pet.) 433, 448; 7 L. ed. 732, 737.

BLACK ON "INTERPRETATION OF LAWS," p. 300, sec. 115.

In petitioner's opinion, the Solicitor General untruly represents (S. 12, 16) that petitioner applied in Gov. Exhibit 2, being D. S. S. Forms 40 and 47, for the involuntary servitude to which it is proposed to subject him (S. 12). All D. S. S. Forms 40 are not uniform, and the one submitted to petitioner contained an unconscionable agreement which conscientious objectors were supposed to sign in order to obtain relief from participation in non-combatant service. The agreement, in form, required the signer to perform work of national importance under civilian direction assigned to him and to conform to all rules and directions made and given with reference thereto by the President of the United States, or by such person as he might designate or appoint for such purpose, pursuant to such rules and regulations as he might prescribe. Petitioner signed this provision in the questionnaire expressly limiting and conditioning it by adding, in his own hand, the words "unless it conflicts with my conscience." Petitioner, as an American citizen, has conscientious scruples against entering into involuntary servitude. The statement on page 7 of the questionnaire "In view of the facts set forth in this questionnaire it is my opinion that my classification should be IV" is not an application for such classification but merely the recitation of a fact. It is in no sense a waiver of constitutional rights. As stated by this Court in *U. S.*

vs. Chicago M. St. P. & P. R. Co., 282 U. S. 311, 51 S. C. 159, 163:

"The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant." Since the grant of exemption from military service to conscientious objectors is, as stated by Cooley, one of long standing constitutional policy in this country, the petitioner did not, by stating the fact that he is a conscientious objector, thereby agree to accept all the pains and penalties sought to be visited by the Director of Selective Service upon conscientious objectors as the price of the legislative and constitutional grant. The Solicitor General failed to meet the issue and begs the question when he argues *ad hominem* that petitioner "is not entitled to complain of its disadvantages (i.e. the disadvantages of slavery) in comparison with military service." (Parenthesis ours.) Retaliatory regulations providing internment of objectors, must be strictly construed (see 91 A. L. R. 795, 803).

The record is clear that the defendant duly raised the issue of the unconstitutionality of the order to report, as imposing involuntary servitude: (1) in the demurrer and motion to quash before the trial (R. 17, Par. 2); (2) in his plea in abatement (R. 23, Par. 3, 4, 5, 6, 7, 8 and 9); (3) in his plea in bar (R. 28, Par. 3 (d), (h) and (i); (4) in his request for instructions (R. 32, Par. 11-17); (5) in his assignment of errors.

The point was argued in the Appeal Court and the Court admitted the seriousness of the issue, but failed to set forth reasoning thereon in its opinion. The whole position of the Circuit Court of Appeals for the Seventh Circuit on the point principally argued in this motion for rehearing is fully stated in the following quotations from the *Gormly case*.

> (P. 228), "Reversal of judgment is sought because: * * * (3) Internment in a conscientious objector's camp constitutes involuntary servitude * * *, in violation of the Federal Constitution. * * *.
>
> (P. 229), "It is not necessary to discuss, at length, issues 1, 3, 4, 5, and 6. They have been sufficiently treated in the case of United States vs. Mroz, 136 F. 2d 221, decided by this Court, June 3, 1943. * * *
>
> (P. 230), "And he was worried also about the pay he was to receive while in the camp."

All that the Court said in *U. S. vs. Alois Stanley Mroz*, on June 3, 1943 having the slightest bearing is here quoted from the Court's opinion:

"(P. 223, 224): The oral argument of counsel at the hearing before this court was vehement in deriding the Selective Service Act and its administration. He contended, among other things, that military service constituted slavery and involuntary servitude in violation of the Thirteenth Amendment to the Constitution. To a greater degree, he argued, was the Selective Service Act violative of Amendment XIII and more clearly constituted involuntary servitude when applied to 'a minister' who had conscientious objections to war, yet was sent to a camp *without pay*. * * *

"(P. 224): On the merits of this appeal a mere listing of appellant's grounds for reversal suggests triviality of merits.

"(Footnote p. 225): The indictment is criticized because vague. It is said to be void because it is not alleged the work is of 'national importance,' nor does it allege his knowledge of the commission of any crime, nor does it allege that the work at the camp would be under 'civilian direction.' The indictment is also said to be void because based on an unlawful delegation of power by Congress to the President and the Director of Selective Service; the order to report was invalid because made arbitrarily and without due hearing and under an Act not providing due process; the proceedings before the appeal board lacked due process; the Selective Service Act is void; the act is in effect a bill of attainder or *ex post facto* law; assignment of defendant to Civilian Public Service Camp is in effect attainder of treason; the conviction was erroneous because based on unreasonable search and seizure and requirement of self-incrimination (i.e., answering the questionnaire). Obviously, much of this attack is not properly based on the alleged vagueness of the charge. Generally speaking the Supreme Court has fully answered the objections in cases that came before it during the last World War. *Arver v. U. S.* (Selective Draft Law Cases), 245 U. S. 366; *Goldman v. U. S.*, 245 U. S. 474; *Cox v. Wood*, 247 U. S. 3; *Ruthenberg v. U. S.*, 245 U. S. 480; *U. S. v. MacIntosh*, 283 U. S. 605; *U. S. v. Williams*, 302

U. S. 46; *Hamilton v. Regents*, 293 U. S. 245. The law is well settled by these decisions and the objections are rejected as frivolous."

The page references are to 136 F (2) No. 1 advance sheets.

From our reading of the opinions and of the footnote, we cannot find that the Circuit Court of Appeals made any reasoned judicial determination with respect to the important point which is discussed in this motion for rehearing. The appeal court, as well as the Solicitor General, seem to prefer to cashier petitioner's rights and the illegal order subjecting him to involuntary servitude, as trivial and frivolous. That is not the way in which charges of infraction of liberty have heretofore been considered by the courts of this land, and we appeal to this court to right the wrong which has been done to petitioner and hear the important question which has been raised, on its merits, along with the *Falbo* and *Billings cases* in which writs of certiorari were granted.

III. AMERICAN CIVIL LIBERTIES UNION BULLETIN

Counsel is in receipt of Bulletin No. 1099 of the Press Service of American Civil Liberties Union, 170 Fifth Avenue, New York, N. Y., for release Monday, October 25, 1943. The bulletin states:

HERSHEY URGED TO END CONTRACTS FOR C. O. CIVILIAN SERVICE

Urging that civilian public service should become more "significant in terms of usefulness to the country," the Union's National Committee on Conscientious Objectors has addressed a letter to Major General Lewis B. Hershey, Director of Selective Service, with three specific suggestions for changes. The present arrangement between Selective Service and the religious agencies now conducting work camps will expire on December 31. The Committee urged:

"1. That contractual relations between Selective Service and all agencies be discontinued and that the present camps conducted by religious agencies be treated as one group of places to which men may be assigned as at present, but without any control by Selective Service save the necessary inspection to determine that they are meeting whatever standards you fix.

"2. That instead of the present camp operations division in Selective Service a C. P. S. division be created, staffed by civilians, not military officers, with full charge over all forms of civilian public service.

"3. That this division assign all men classified IV-E either (1) to one of the camps under religious auspices, (2) to the government camp, (3) directly to the present detached services, (4) to the so-called guinea pig projects, or (5) to such other individual or group services as meet whatever standards you fix."

The Committee argued that "these comparatively simple changes" would obviate the following difficulties:

"1. They would remove all criticism that religious camps conducted by private agencies are virtually under control of Selective Service.

"2. They would remove all criticism that the direction of civilian public service is in the hands of military officers.

"3. They would solve the problem of pay, for agencies to which men are assigned would be free to pay nothing or anything up to whatever limit Selective Service might fix.

"4. They would tend to assign men in accordance with their occupational abilities, thus permitting them to render maximum service to the country instead of requiring them to do work for which many are not fitted.

"5. They would prevent the many unnecessary commitments to prison of IV-E men who now refuse service in work camps and who would doubtless be willing to undertake one of the other forms of service outside.

"6. They would result in withdrawing from the courts the several pending legal contests involving military direction and the retention of pay."

The Committee points out that Selective Service would still retain full control over the entire civilian public service program by withdrawing its approval from any camp or agency which does not meet its standards, and by withdrawing from it men assigned. The communication was signed by Ernest Angell, chairman.

Ernest Angell, whose name is shown as chairman, is a member of the Bar of the State of New York, and has his office in the City of New York. Petitioner in his pleas defended on the ground that the order was invalid because the place where he was ordered to report did not conform to the Congressional requirement of "work of national

importance under civilian direction." Evidence to support the defense was offered, denied admission and exception taken (T. 68-82). The bulletin quoted above supports the defenses pleaded.

In the same bulletin appears the following item:

UNION AIDS C. O. REFUSING TO WORK WITHOUT PAY

The A. C. L. U. is aiding in the defense of James Manoukian, indicted in Denver, Colorado, for refusal to work at the government camp for conscientious objectors at Mancos. Manoukian said he was willing to work if paid, but to accept work without pay is to "agree to a theory abhorrent to basic American principles." Test cases on the right of the government to exact compulsory labor without pay are being started by several other conscientious objectors, with the aid of the Union. Petitions for writs of habeas corpus to release the men from camps will be sought on the ground that regulations violate constitutional rights.

Manoukian, who pleaded not guilty before a Denver judge in September, is now in the Denver County jail. He is represented by Carle Whitehead, one of the Denver attorneys for the A. C. L. U.

These quotations from the Bulletin and Press Release of the American Civil Liberties Union are inserted at this point to show that the position of the petitioner before this Court is not a mere figment of the imagination and not a triviality as the Solicitor General attempts, in his brief, to lead the Court to believe. There are decisions of this Court to the effect that involuntary servitude does not necessarily depend upon whether the slave is paid wages or not, but the test is whether he engages in the servitude freely and willingly.

If this court declines to grant this petition, some petitioner whose sincerity is more convincing, or who comes to court at a time when the apple-cart already tipping can no longer be stayed, will be heard. A deaf ear will not satisfy the cries springing up over the land against this great national injustice. It would be more fitting to hear the questions raised by petitioner at this time when the Act in question will be under examination by the court in two other cases, raising similar issues.

IV. ARGUMENT OF ARTHUR J. EDWARDS ADOPTED

About the time that this court denied petitioner's request for writ of certiorari, his counsel received an unsolicited letter from Arthur J. Edwards of Montclair, N. J. This led to an exchange of letters and those from Mr. Edwards have been consolidated in logical sequence, introducing Mr. Edwards, but omitting some other portions deemed immaterial. Petitioner presents this argument and adopts it as his own to demonstrate to the court that he is not alone in his firm conviction that the Civilian Public Service Camps were not authorized by Congress and are extra-legal and so, illegal; that if his is a voice crying in the wilderness (Isaiah 40-3) it is as in Holy Writ, the voice of God, abhorring the smell of slavery, and will grow in volume as it swells across the land. The letter of Mr. Edwards, so consolidated, reads:

Perry J. Stearns, Esq.,
927 Wells Building,
Milwaukee 2, Wis.
Dear Mr. Stearns:

Re: Walter Ford Gormly v. United States

From very brief newspaper accounts I have become interested in the above case because it seems to be an authentic instance of a violation of constitutional rights in the administration of the Selective Service Act. I am neither a conscientious objector nor a pacifist, but have been interested since the introduction of the Burke-Wadsworth Bill in the correction of the great injustices perpetrated on conscientious objectors during World War I.

I know the law applicable to conscientious objectors from a rather intimate connection with its inception and application, but not much about procedure, and was one of the group which by testimony before the Military Affairs Committees in the summer of 1940 secured the introduction and adoption of the present provisions of the Selective Service Act which did not appear at all in the bill when introduced. I testified before Representative May's Committee on July 30, 1940, and my contribution appears on pp. 361-366 of the printed Hearings. I have been a student and commentator on constitutional law for many years, particularly the powers of Congress, and have such good authority as the late James M. Beck that I should regard

myself as a lawyer in the Websterian sense of "one who is versed in law." My military training came from a term at St. John's Military Academy, Delafield, Wisconsin, in 1894. I was a member in World War I of Secretary Baker's Board of Inquiry, detailed by him in an article in Columbia Law Review soon after the war.

I have maintained since the camps were started that for the conscientious objector who strenuously objected to such assignment to work as being opposed to his constitutional rights, the conditions of such assignment by his draft board amounted to consignment to "involuntary servitude" which was not "as a punishment for crime whereof the party shall have been duly convicted." To be possessed of a conscience which within one's person prohibits the doing of certain acts is not a crime, though it may not conform to the generally expected and demanded standard of conduct. In fact, Congress, by an act of grace, has made adequate definition and provision for such exceptional cases in Sec. 5 (g) of the Act.

That such work under such conditions of unwillingness is "involuntary" is beyond question. I have sought to determine whether "servitude" has some legal restrictions which make it mean something less than merely service required to work out an obligation, financial or duty, to some person, government or cause. As to the instant application there can be no doubts. I suggest the reading of *Butler v. Perry*, 240 U. S. 328, 333. Work in a Civilian Public Service camp, compulsory, involuntary, without compensation, and in fact under a further charge for subsistence, does not appear to be "one of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc.," or work upon the highway in lieu of tax payments for maintenance of roads, as in that case. See also 12 C. J. 937-938, under Constitutional Law. Also *Flannagan v. Jepson*, 177 Iowa 393, 158 N. W. 641, re want of power of Judge to imprison for contempt of court at hard labor without a jury trial.

Highway work, as in the *Butler case*, stems back to old English usage and law. The work had to be done for the preservation of community facilities and the State cared not whether the citizen did the work himself, hired a substitute, or paid taxes which enabled the community to hire it done. Work in conscientious objector camps is essentially different. It is a function which was not systematically

performed by anyone in pre-war days. It was not one of the duties individuals owe to the State. It is required of no one whatsoever except those ordered to camps by draft boards. It is not a system even visioned by Congress so far as my investigation of the hearings discloses. No one suggested to Congress that this was what their words meant. It was a system initiated by private enterprise—by the so-called historic peace churches, financed by them and such as voluntarily contributed to help them. It is awfully hard to comprehend the idea of something required of men that Congress never conceived of and to impose a five year sentence for violation of a mere regulation unsupported by constitution or law.

The following are excerpts from "A report on the Treatment of Conscientious Objectors in World War II —Conscience and the War," just published by the American Civil Liberties Union, page 22 (showing mandatory character of work required):

> "Selective Service's attitude was presented in a memorandum drawn up by Lieut.-Col. Franklin A. MacLean about a year ago at a training course for Civilian Public Service Camp directors. He says:
>
> > 'From the time an assignee reports to camp until he is finally released he is under control of the Director of Selective Service. He ceases to be a free agent and is accountable for all of his time, in camp and out, 24 hours a day. His movements, actions and conduct are subject to control and regulation. He ceases to have certain rights and is granted privileges instead. These privileges can be restricted or withheld without his approval or consent as punishment, during emergencies or as a matter of policy. He can be told when and how to work, what to wear, and where to sleep. He can be required to submit to medical examinations and treatment and to practice rules of health and sanitation. He may be moved from place to place and from job to job, even to foreign countries for the convenience of the government regardless of his personal feelings and desires.'"

The foregoing is also quoted in "The Conscientious Objector under the Selective Training and Service Act of 1940" published by the National Service Board for Re-

ligious Objectors, Aug. 1, 1943, the official agency of the United States. (Reg. 653 and 691.) This quotation from the Memorandum of Lt. Col. MacLean interprets briefly the rather extended regulations appearing at pages 16-22 of your brief in which the compulsive parts may escape the reviewing judges.

For a man who does not want such an assignment, it would be difficult to define "involuntary servitude" in clearer or more specific terms.

Page 10—

> "This arrangement (the Civilian Public Service Camps) was proposed to the government just after the draft act was passed, based on the desire of the 'historic peace churches' to take care of their own men."

Page 11—

> "* * * civilian work is on the whole less satisfac- factory than the farm labor and reconstruction work of the first World War, and men are not permitted as then to receive a soldier's pay."

Creation of a national personal servitude by Congress or by an administrative body authorized by Congress, must, if at all possible, be by specific enactment carrying into execution one of the designated powers of the Constitution. Such servitude, particularly when required of one who does not voluntarily submit to it, cannot be assumed to be authorized merely by inference from such general language as "shall, if he be conscientiously opposed * * * in lieu of such induction be assigned to work of national importance under civilian direction." This is particularly unwarranted where no constitutional power supports the right of an administrative body to make such requirements, and where the meaning of the words is given a strikingly different interpretation in English practice, from whose laws the Congress adapted the words and incorporated them into the Selective Service Act.

I was discussing this general proposition with one of our local draft board members, who, I have assumed, was not particularly sympathetic to the conscientious objector position, and he said that he thought the Civilian Public Service camp system as administered, partook too much of the nature of prison camps, assignment thereto in the nature of punishment for a type of mind or personality. In this view the word "assign" takes on too much the

realistic meaning of "sentence" for those who are not amenable to the assignment.

The Act of Congress enforcing the XIIIth Amendment may not cover this situation. I refer to U. S. C. Title 8, Sec. 56 and U. S. C. Title 18, Sec. 444, without opportunity to extend the search. As against an action of the United States itself, I think a failure of enforcement act to cover the situation would not be material.

Then the provision of the Selective Service Act: "in lieu of such induction, be assigned to work of national importance under civilian direction * * *," needs careful analysis. These words were adapted from the English law, the Military Training Act of May 26, 1939, which according to the debate in Parliament on May 11, 1939, then read, with respect to men classified as conscientious objectors:

> "shall be conditionally registered * * * the condition being that he must engage in, and perform, some *work* designated in the order as being, in the opinion of the tribunal, *of national importance.*"

This Act was superseded on September 3, 1939 by the National Service (Armed Forces) Act in which this work phrase was changed to work "of a civil character and under civilian control," without, I believe, any intention of changing the essential meaning. I know for a fact the exact circumstances of the transplanting of these words of the May and September 1939 Acts into the Selective Service Bill. In England, this means an inquiry by the draft board as to what a man is doing, and if his status as a conscientious objector is established, then merely in the exertion of the Board's power to see that the man is engaged in his old job which is of "civil importance," or making him transfer to a new job, not contributing directly to the war effort, but useful to the community in its more ordinary functions. In one case I read the man's answer was that he was driving a "milk lorry." They told him to continue such driving occupation. Failure to allow an American to continue in the community at work at any occupation of national importance, when he has one, has seemed to me the great distortion in the administration of Sec. 5 (g).

Definition of "work of national importance" is difficult for the reason that I do not believe it appears previously in any United States law, at least none that have come to my attention.

Then I feel that embodied in the phrase "in lieu," there must be some equality in the substitution, and that if it is employment and work considered by the United States as of national importance there must be included an equitable element of monetary compensation as well. Instead of which the Selective Service has construed this to mean work without compensation, and, most extraordinary of all, a payment to the government for sustenance.

An appropriate answer to the opinion of the Circuit Court of Appeals, quoted at page 48 of your brief to the effect that the appellant "seemingly fails to realize that war is realistic," is found in an editorial in "Life" for October 4, 1943, quoting General George C. Marshall, and saying (p. 34):

> "The United States, the General (Marshall) pointed out, is a democracy in which citizens have certain rights. And whatever happens we must stand for these rights and never countenance their destruction."

The opinion misses the entire argument that rights have been granted this man by Congress whatever the court's opinion as to wisdom of Congressional action. Yours is merely a proceeding to prevent destruction of those rights by an administrative failure to properly understand the language of the act and interpret the novel clauses in the light of England's law from which it was incorporated.

The settled principle enunciated in *Frost vs. Railroad Commission*, 271 U. S. 583, 594, 8, 46 S. C. 605, 607, 609 (cited p. 30 of your brief) is there stated with force.

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the sur-

render of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

What is there said at 271 U. S. 598, 46 S. C. 609 may best be paraphrased, to apply it specifically to *Mr. Gormly's case*, as follows:

". . . and the principle that a state (and likewise the United States) is without power to impose an unconstitutional requirement (involuntary servitude in a C. P. S. camp) as a condition for granting a privilege (assignment to work of national importance in lieu of induction) is broader than the application thus far made of it." (applications suggested in parentheses are supplied.)

As to the opinion in the *Mroz case* I am particularly shocked at the last full paragraph at p. 24 and its complete failure to realize the psychology of the C. O. And it's a peculiar psychology which it is difficult for the rest of us to realize or even sympathize with—we can just scientifically recognize its existence and, legally, the fact that Congress has also done so and made a certain type of provision for it. The essential difference between the 1917 and the 1940 selective service laws is that the first recognizes, with respect to the administration of the raising of an army, only the military department of the government. This was the background of the Arver vs. U. S. decision and the then duty of the citizen to be inducted into the army and then make his plea for special treatment in case his conscientious objection was upheld upon examination by army officers. That situation was completely changed in 1940.

Conscientious objection is not an act or conclusion of the intellect. Rather it is a reaction of the whole personality which just will not let a person do something which the conscience forbids. It is strictly comparable to the reaction of most normal persons who will not commit the more heinous crimes named in the Ten Commandments, not because of their authority, not because of fear of punishment, not because of some intellectual conclusion that they are wrong, but just because their's is a personality that does not and will not do such acts.

I got some insight into "involuntary servitude" in acting on a Committee which induced our New Jersey Governor not to honor an extradition order which would have returned a South Carolina sharecropper to what we insisted was a state of peonage or involuntary servitude. One of the latest of the peonage cases is *Taylor vs. Georgia*, 62 S. Ct. 415 (1942), from which

> "The necessary consequence is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of legal sanction to remain at his employment until the debt is discharged. Such coerced labor is peonage."

Peonage is merely a subdivision of "involuntary servitude" where the condition is the working out of a debt. The "in terrorem" effect may be supplied by the local law, just as in this case it is the misconstruction of the Selective Service Act which inspires the local Draft Board to send a man to involuntary servitude.

This is only a sketch of what I have long wanted to see argued out before the Supreme Court in a case where conditions would justify.

Very truly yours,

Arthur J. Edwards.

Just as the strict position taken by the Court in *Minersville School District vs. Gobitis*, 310 U. S. 586, 60 S. C. 1010, was reversed by *West Virginia State Board of Education vs. Barnette*, Supreme Court Reporter advance sheets, July 1, 1943, 63 S. C. 1178, so there is hope that the decision of this Court in *U. S. vs. MacIntosh*, 283 U. S. 605; 75 L. Ed. 1302, may be reversed. We call attention particularly to the dissenting opinion of Chief Justice Hughes in which Justices Holmes, Brandeis and Stone concurred. The Chief Justice there said, 75 L. Ed. 1312 seq.:

> "I think that the requirement should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute. If such a promise (to bear arms) is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms, and we should not, by judicial decision, attempt to perform

what, as I see it, is a legislative function." (Parentheses ours) * * *

Page 1314

"But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress. * * *

"The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. * * *

P. 1315

"The Congress has sought to avoid such conflicts in this country by respecting our happy tradition."

Petitioner believes that upon taking jurisdiction and considering this case on its merits the Court would find, like the minority in the case last quoted, that administrative zeal has outrun the act of Congress; that the involuntary servitude inherent in the invalid order for failure to obey which petitioner was sentenced below, is not within the terms of the Act of Congress, and to imply such power in the Director of Selective Service, i. e. to impute to Congress an intention to depart from American traditions and express prohibitions in the Constitution.

Mr. Edwards, in one letter, cites *State ex rel. Burnes National Bank vs. Duncan*, 265 U. S. 17; 44 S. C. 427, 428, in which this Court said:

"The states cannot use their most characteristic powers to reach unconstitutional results * * *. There is nothing over which a state has more exclusive authority than the jurisdiction of its courts, but it cannot escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent."

The same applies to the United States. It is a characteristic power to raise armies, but the exercise of such power cannot be availed of to violate plain prohibitions

of the Constitution, the panoply under which petitioner appears before this Court. Since the legislature cannot deny jurisdiction to the courts, so the courts should not surrender their jurisdiction to administrative boards.

CONCLUSION

The traveling salesman with a bill of goods usually has some letters of recommendation, and I print here a letter dated October 26, 1943, just received from Claude F. Cooper, Esq., Blytheville, Arkansas, acknowledging receipt of briefs in support of petitions for writ of certiorari in the *Gormly and Mroz* cases which he had requested. He says:

> "I am very much interested in these cases as I have some along the same lines and I feel sure that your briefs will be a wonderful help to me.
>
> "I think your petition should have been granted; but, of course, we can't always get everything we want. I have read your petition and brief and I do not see how or why it should have been denied. I think the matters are all well presented and I know your brief will be a great help to me in many ways."

On the other hand, in the same mail, I am in receipt of a postcard postmarked Sandstone, Minnesota, October 27, 1943, reading as follows:

> "As you see I have been assigned to Sandstone. Yours very truly, Walter F. Gormly."

In "The Atlantic Monthly" for October, 1943, Vol. 172, p. 57, one M. S. Hedges has an article entitled "The Search for the Democratic Man." The writer seems to be in some turmoil between a desire for perfection of the individual and a belief that a better world may be created by compulsion. He says, p. 59:

> "The state must constantly strive to divest itself of its own power. * * *

P. 61:

> "Human institutions created for freedom appear to have a way of enslaving the men for whom they were created. * * *
>
> "Man's willingness to enslave and to exploit his fellows tethers man to a slave order."

While the article is somewhat confused, it brings

sharply to mind the important function of this Court in preserving the institutions of individual freedom for which our fathers fought and for which our sons are now fighting, all under the aegis of the Bill of Rights.

In a tribute by Henry Seidel Canby to Wilbur L. Cross, author of "Connecticut Yankee, an autobigraphy," he says, "Of all Connecticut men in my time, Governor Cross is the outstanding example, the type and prototype of what is best in Connecticut. * * * He has its calculated obstinancy in a good cause, and its unexpected blaze of courageous anger when the time comes to champion the tough and unpopular and misunderstood issue, and make it win." The Connecticut type is the American type. The same blood that settled New England settled Virginia. The Yankees who joined with the Virginians to establish freedom as the keystone of American government in the Declaration of Independence and Constitution of 1787 as amended, still keep that spark alive in a totalitarian world. It burns on the altars of American freedom, on the hearths of American homes and in the hearts of free men everywhere. As Pallas was the goddess of wisdom, so wisdom has made a written constitution the palladium of our liberties and the Supreme Court the bulwark of that Constitution against anticipated executive and legislative attacks. The American people resent the attacks which have been made on the courts; and on the Constitution as an outmoded instrument. No bogey of national unity or economic security can long defeat the fundamental mainspring of individual freedom under our Constitution. Witness West Virginia State Board of Education vs. Barnette, 319 U. S. ..., 63 S. C. 1178 overruling Minersville School District vs. Gobitis, 310 U. S. 586, 60 S. C. 1010.

Woe to that combined office of Director of Selective Service and Chairman of War Manpower Commission. Woe to those in authority whether as administrators or advocates who contribute to the enslavement of a single American citizen in the name of freedom and equality.

Woe unto them that call evil good, and good evil. (Isaiah 5:20)

Woe to them that devise iniquity! (Micah 2:1)

Woe unto the world because of offences! For it must needs be that offences come; but woe to that man by whom the offence cometh! (Matthew 18:7)

Woe unto that man by whom the Son of Man is betrayed! (Matthew 26:24)

Woe unto that man who has the responsibility of safeguarding individual freedom under the Constitution from conspiracies in high places, and is derelict in that duty. May the wrath of Heaven reward him according to his merits.

The Connecticut Yankee has enpeopled the land. See "Migrations from Connecticut" by Mrs. Lois Kimball Mathews Rosenberry of Madison, Wis., being pamphlets XXVIII and LIV of the Tercentenary Commission of the State of Connecticut, Yale University Press, New Haven, Conn., 1936. His "calculated obstinacy in a good cause" is due for another "unexpected blaze of courageous anger."

Since freedom is so dependent on the written word, we pray that what we have here written in all respect to court and counsel, may influence the court to review the order denying petitioner's prayer for writ of certiorari and to grant the prayer. Thus only may a serious infraction of the Act of Congress be corrected without delay and thus only may justice be done to thousands of young men suffering martyrdom under foreign concepts. Such concept is that he who does not concede the total power of the state is an enemy of the state and cannot safely be at large. Totalitarianism is not Americanism. Congress by its Act does not class the conscientious objector as an enemy. The Director of Selective Service by an invalid order beyond the authority given by Congress has sought to isolate petitioner as an enemy along with other objectors. That such order was illegal and invalid is a complete defense to the indictment. The order denying the writ should be reversed.

Respectfully submitted,

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